INDEX

	Page
Relevant Docket Entries	1
Complaint for Declaratory Judgment and Injunction, filed June 9, 1962	6
Motion for Preliminary Injunction, filed June 9, 1962	20
Affidavit in Support of Motion for Preliminary Injunction, filed June 9, 1962	22
Exhibit A	28
Exhibit B	31
Exhibit C	34
Motion of Whitney National Bank in Jefferson Parish to Intervene as a Defendant, filed June 19, 1962	40
Affidavit in Support of Defendant, filed June 20, 1962	41
Defendant Saxon Exhibit 1	49
Exhibit 2	57
Exhibit 3	58
Exhibit 4 Transcript of Proceedings	59
Proceedings	62
Oral Argument of Keehn W. Berry, President, Whitney Holding Corporation	63
Oral Statement of Louis J. Roussel, American State Gulf Natural Gas Corporation and Universal Drilling Company, Inc.	75
Oral Statement of Clem H. Sehrt, Sehrt & Boyle	83
Oral Statement of Victor J. Passera, Jr., President, [illegible] National Bank of Commerce in Jefferson Parish	90
Rebuttal Statement of Malcolm L. Monroe, Monr[illegible] Lemann, New Orleans, Louisiana	92
Exhibit 5	96
Order Approving Application Under Bank Holding Company Act	97
Application By Whitney Holding Corporation for Permission To Become a Bank Holding Company: Statement	99
Concurring Statement of Governor Mitchell	107
Dissenting Statement of Governor Robertson	109
Defendant's Exhibit 6	112
Affidavit in Support of Defendant, filed June 21, 1962	115

	Page
Intervening Defendant Exhibit A	119
Exhibit B	132
Exhibit C	139
Exhibit D	141
Exhibit E	143
Exhibit F	144
Plaintiffs' Opposition to Motion of Whitney National Bank in Jefferson Parish To Intervene as a Defendant, filed June 26, 1962	147
Defendant's Response to Motion of Whitney National Bank in Jefferson Parish To Intervene as a Defendant, filed June 21, 1962	148
Exhibit A	151
Exhibit B	155
Exhibit C	156
Exhibit D	157
Affidavit in Support of Plaintiffs, filed June 25, 1962	159
Plaintiffs' Exhibit E	161
Plaintiffs' Exhibit F	165
Plaintiffs' Exhibit H	166
Plaintiffs' Exhibit I	167
Petition of the Bank of Louisiana in New Orleans, Intervening Plaintiff, for Declaratory Judgment and Injunctive Order, filed June 26, 1962	170
Motion for Voluntary Dismissal by Merchants Trust and Savings Bank, filed June 26, 1962	172
Affidavit in Support of Application for Withdrawal or Discontinuance of Suit By Plaintiff, Merchants Trust and Savings Bank, filed June 26, 1962	173
Motion for Temporary Restraining Order, filed June 27, 1962	174
Affidavit in Support of Plaintiffs, filed June 27, 1962	175
Temporary Restraining Order, filed June 27, 1962	176
Official Transcript of Proceedings, filed July 7, 1962	178
Defendant's Response to Motion of the Bank of Louisiana in New Orleans To Intervene as a Plaintiff, filed June 29, 1962	192
Defendant's Response to Motion for Voluntary Dismissal By Merchants Trust and Savings Bank, filed June 29, 1962	193
Affidavit in Support of Plaintiffs, filed July 5, 1962	193

Page

Affidavit in Support of Plaintiff, Bank of New Orleans and Trust Company, fied July 5, 1962 201
Order Granting Motion of The Bank of Louisiana in New Orleans to Intervene as a Plaintiff, filed July 5, 1962 203
Affidavit in Support of Motion for Preliminary Injunction, filed July 5, 1962 204
Affidavit in Support of Plaintiffs, filed July 6, 1962 209
Order, filed July 6, 1962 210
Answer of Intervening Defendant to Plaintiffs' Complaint for Declaratory Judgment and Injunctive Order, filed July 10, 1962 211
Order Approving Application Under Bank Holding Company Act 217
Order Allowing Whitney National Bank in Jefferson Parish to Intervene as a Defendant, filed July 10, 1962 218
Findings of Fact and Conclusions of Law in Support of Preliminary Injunction, filed July 10, 1962 219
Preliminary Injunction, filed July 10, 1962 221
Motion of Defendant Comptroller of the Currency for Summary Judgment, filed July 11, 1962 222
Statement of Defendant Comptroller of the Currency Pursuant to Local Civil Rule 9(h), filed July 11, 1962 223
Official Transcript of Proceedings, filed July 16, 1962 225
Plaintiffs' Opposition to Defendant Comptroller's Motion for Summary Judgment and Cross-Motion for Summary Judgment in Their Favor Against Defendant Comptroller, filed July 24, 1962 274
Plaintiffs' Statement of Facts in Support of Cross-Motion for Summary Judgment, filed July 24, 1962 275
Plaintiffs' Exhibit L 295
Plaintiffs' Exhibit M 301
Affidavit in Support of Plaintiff, Bank of Lousiana in New Orleans, filed July 24, 1962 303
Affidavit in Support of Plaintiff, Guaranty Bank & Trust Company, Lafayette, Louisiana, filed July 24, 1962 305
Opposition of Defendant Comptroller of the Currency to Plaintiffs' Cross-Motion for Summary Judgment and Further Cross-Motion of Said Defendant to Dismiss, filed August 10, 1962 306

Page

Statement of Defendant Comptroller of the Currency in Response to the Statement of Facts Supporting Plaintiffs' Cross-Motion for Summary Judgment, filed August 10, 1962 307
Supplementary Affidavit of James J. Saxon, Comptroller of the Currency, filed August 10, 1962 309
Defendant Saxon Exhibit 7 311
Motion for Leave to Amend Answer, filed August 13, 1962 313
Supplemental Answer of Intervening Defendant Whitney National Bank in Jefferson Parish, filed September 10, 1962 314
Motion of Intervening Defendant for Summary Judgment, filed August 13, 1962 317
Statement of Intervening Defendant Whitney National Bank in Jefferson Parish of Material Facts as to Which There is no Genuine Issue, filed August 13, 1962 318
Affidavit in Support of Intervening Defendant, filed August 13, 1962 324
Intervening Defendant Exhibit 5 327
Affidavit in Support of Intervening Defendant, filed August 13, 1962 329
Exhibit 1 331
Exhibit 2 333
Exhibit 3 336
Exhibit 4 337
Statement of Points and Authorities of Intervening Defendant, filed August 13, 1962 339
Statement of Genuine Issues Filed By Intervening Defendant Whitney National Bank in Jefferson Parish in Opposition to Plaintiffs' Motion for Summary Judgment, filed August 13, 1962 343
Response of Defendant Comptroller of the Currency to Motion of Intervening Defendant for Summary Judgment, filed August 22, 1962 344
Response of Defendant Comptroller of the Currency to Motion of Intervening Defendant for Leave to Amend Answer, filed August 22, 1962 345
Motion of J. W. Jeansome, State Bank Commissioner of the State of Louisiana, To Intervene as a Plaintiff Herein, filed September 4, 1962 346

Page

Complaint of Intervening Plaintiff, J. W. Jeansonne, Louisiana State Bank Commissioner, filed September 10, 1962... 348
Plaintiffs' Opposition to Intervening Defendant's Motion for Summary Judgment and Motion for Leave to Amend and to Defendant's Motion to Dismiss, filed September 5, 1962. 359
Plaintiffs' "Statement of Genuine Issues" In Opposition to Defendant's and Intervening Defendant's Cross Motion for Summary Judgment, filed September 6, 1962..... 360
Exhibit O 366
Exhibit P 367
Exhibit Q 368
Exhibit R 369
Exhibit T 370
Exhibit U 371
Exhibit V-1 372
Exhibit V-2 373
Exhibit V-3 374
Exhibit V-4 375
Exhibit V-5 376
Exhibit V-6 377
Exhibit V-7 378
Exhibit V-8 379
Exhibit W 380
Exhibit X-1 381
Exhibit X-2 382
Exhibit Y 383
Stipulation, filed September 7, 1962..... 384
Order Allowing State Bank Commissioner to Intervene as a Plaintiff, filed September 7, 1962..... 385
Order Allowing Intervening Defendant Whitney National Bank in Jefferson Parish To Serve and File an Amended Answer, filed September 7, 1962..... 387
Supplemental Affidavit in Support of Intervening Defendant, filed September 14, 1962..... 388
Intervening Defendant Exhibit 6..... 392
Answer of Intervening Defendant to Complaint of Intervening Plaintiff, J. W. Jeansonne, State Bank Commissioner of the State of Louisiana, filed September 18, 1962.. 391

	Page
Motion of the National Association of Supervisors of State Banks for Leave to Appear as Amicus Curiae, filed September 25, 1962	403
Opposition of J. W. Jeansonne, State Bank Commissioner of Louisiana to the Motion for Summary Judgment by Defendant, Comptroller of the Currency, and Whitney National Bank in Jefferson Parish, Intervening Defendant, and Cross-Motion for Summary Judgment, filed September 26, 1962	413
Exhibit 1	414
Exhibit 3	416
Order Granting Motion of the National Association of Supervisors of State Banks for Leave to Appear as Amicus Curiae, filed September 26, 1962	419
Plaintiffs' Supplemental Statement of Genuine Issues Under Local Rule 9h in Opposition to Intervening Defendant's Motion for Summary Judgment, filed September 27, 1962	420
Plaintiffs' Exhibit Z-1	423
Plaintiffs' Exhibit Z-2	424
Plaintiffs' Exhibit AA-1	425
Plaintiffs' Exhibit AA-2	426
Plaintiffs' Exhibit CC-1	427
Plaintiffs' Exhibit CC-2	428
Opposition of Defendant Comptroller of the Currency to Cross-Motion of Intervening Plaintiff J. W. Jeansonne for Summary Judgment, filed October 5, 1962	429
Statement of Defendant Comptroller of the Currency in Response to the Statement of Facts Supporting the Cross-Motion of Intervening Plaintiff J. W. Jeansonne for Summary Judgment, filed October 5, 1962	430
Motions and Cross-Motions for Summary Judgment and Motion to Dismiss, filed November 16, 1962	431
Memorandum, filed November 5, 1962	435
Intervening Defendants' Objections to the Form of Plaintiffs' Order for Summary Judgment and Judgment, filed November 23, 1962	438
Memorandum in Support of Intervening Defendant's Objections to the Form of Plaintiffs' Proposed Order for Summary Judgment and Judgment, filed November 23, 1961	440

Page

Defendant Comptroller's Objections to Form of Proposed Order for Summary Judgment and Judgment as Submitted by Plaintiffs, filed November 26, 1962 443

Findings of Fact and Conclusions of Law in Support of Declaratory Judgment and Permanent Injunction, filed December 5, 1962 444

Order, filed December 5, 1962 450

Notice of Appeal, filed January 31, 1963 452

Notice of Appeal, filed February 1, 1963 453

	Page
Proceedings in the United States Court of Appeals for the District of Columbia Circuit	454
Opinion, Miller, J.	454
Judgment	481
Order denying the petitions for rehearing en banc	482
Clerk's certificate (omitted in printing)	485
Order extending time in which to file petition for certiorari in Case No. 798	486
Orders allowing certiorari	487

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,672

WHITNEY NATIONAL BANK IN JEFFERSON PARISH, *Appellant*,

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, *et al.*, *Appellees*.

No. 17,681

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY, *Appellant*,

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, *et al.*, *Appellees*.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JOINT APPENDIX

CIVIL DOCKET

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

C. A. No. 1857-62

BANK OF NEW ORLEANS AND TRUST CO., ET AL.

vs.

JAMES J. SAXON, ET ANO.

RELEVANT DOCKET ENTRIES

Date	Proceedings
1962	
June 9	Complaint.
June 9	Motion of plaintiffs for preliminary injunction; affidavit of Edward L. Merrigan; exhibits A through D.
June 19	Motion of Whitney National Bank in Jefferson Parish to intervene.
June 20	Opposition of defendants to motion of plaintiffs for preliminary injunction; affidavit of James J. Saxon, exhibits 1, 2, 3, 4, 5 and 6.
June 21	Affidavit of James J. Gilly, President of Whitney National Bank in Jefferson Parish; exhibits A, B, C, D, D-1, D-2, E and F.
June 21	Response of defendant to motion of Whitney National Bank in Jefferson Parish to intervene.
June 26	Opposition of plaintiffs to motion of Whitney National Bank in Jefferson Parish to intervene.
June 26	Affidavit of Morgan L. Whitney and exhibits A through D; exhibit to motion of Whitney National Bank in Jefferson Parish to intervene.
June 26	Affidavit of Laurence A. Merrigan; exhibits E, F, H, and I.
June 26	Motion of the Bank of Louisiana in New Orleans to intervene.
June 26	Motion of plaintiff #2 for voluntary dismissal; affidavit of Paul F. Rogyom.

Date	Proceedings
1962	
June 27	Motion of plaintiff for temporary restraining order; affidavit of Edward L. Merrigan.
June 27	Temporary Restraining Order, security in sum of $1,000.00; issued at 11:05 A.M. June 27, 1962. Hart, J.
June 29	Response of defendant to motion for voluntary dismissal by Merchants Trust and Savings Bank.
June 29	Response of defendant to motion of Bank of Louisiana in New Orleans to intervene.
July 5	Affidavit of Jacques A. Livaudais; affidavit of Edward L. Merrigan; affidavit of Leon M. Trice; exhibits J-O inclusive.
July 5	Order granting motion of The Bank of Louisiana in New Orleans for leave to intervene as plaintiff. Pine, J.
July 6	Affidavit of attorney Joseph Merrick Jones.
July 7	Transcript of proceedings of June 27, 1962; pages 1-27; Reporter George G. Davis (Clerk's copy).
July 6	Order dismissing cause as to plaintiff #2. Holtzoff, J.
July 10	Order granting Whitney National Bank in Jefferson Parish leave to intervene as party defendant. Holtzoff, J.
July 10	Answer of Whitney National Bank in Jefferson Parish to complaint; exhibit.
July 10	Findings of fact and conclusions of law. Holtzoff, J.
July 10	Preliminary injunction restraining defendant #1; Bond set at $50,000.00 to be filed no later than 7-17-62. Holtzoff, J.
July 11	Motion of defendant Saxon for summary judgment; statement.
July 16	Transcript of proceeding of July 6, 1962; Vol. I, pages 1-87 (Rep. by Gerald Nevitt).
July 24	Opposition of plaintiff to motion of defendant Saxon for summary judgment; cross motion for summary judgment; statement; exhibits L, M of plaintiffs; affidavits of Clyde C. Wheeler and R. J. Castille.

Date	Proceedings
1962	
Aug. 10	Opposition of defendant comptroller of the currency to plaintiffs' cross-motion for summary judgment and further cross-motion of said defendant to dismiss; statement of facts; supplementary affidavit of James J. Saxon; exhibit 7.
Aug. 13	Motion of intervening defendant for leave to amend answer; exhibit.
Aug. 13	Motion of intervening defendant for summary judgment; statement of intervening defendant of material facts; affidavit of E. A. Waffenschmidt; affidavit of James Gilly and exhibits (4); points and authorities in support of this motion and in opposition to plaintiffs' motion for summary judgment.
Aug. 13	Statement of genuine issues of intervening defendant in opposition to plaintiffs' motion for summary judgment.
Aug. 22	Response of defendant #1 to motion of intervening defendant for summary judgment.
Aug. 22	Response of defendant #1 to motion of intervening defendant for leave to amend answer.
Sept. 5	Motion of J. W. Jeansonne, State Bank Commissioner of Louisiana, to intervene as plaintiff; exhibit.
Sept. 5	Opposition of plaintiffs to intervening defendant's motion for summary judgment and motion for leave to amend and to defendant's motion to dismiss.
Sept. 6	Plaintiffs' exhibits O through Y.
Sept. 6	Statement of plaintiffs of genuine issues in opposition to defendant's and intervening defendant's cross-motion for summary judgment.
Sept. 7	Stipulation re motions filed 8-10-62, 7-11-62, 8-13-62 and 7-24-62.
Sept. 7	Consent order allowing J. W. Jeansonne, State Bank Commissioner of Louisiana, to intervene as a plaintiff and directing complaint filed; amending caption of action. Jones, J.
Sept. 7	Order granting Whitney National Bank leave to serve and file amended answer. Jones, J.

Date	Proceedings
1962	
Sept. 10	Supplemental answer of intervening defendant Whitney National Bank in Jefferson Parish.
Sept. 10	Complaint of intervening plaintiff J. W. Jeansonne.
Sept. 14	Affidavit of James Gilly, Jr.; intervening defendant's exhibit 6.
Sept. 18	Answer of intervening defendant to complaint of intervening plaintiff, J. W. Jeansonne.
Sept. 25	Motion of National Association of Supervisors of State Banks for leave to appear as Amicus Curiae; memorandum; appendices A, B, C, D.
Sept. 26	Opposition of J. W. Jeansonne to motion for summary judgment; exhibits 1 and 3.
Sept. 26	Order granting motion of National Association of Supervisors of State Banks to appear as Amicus Curiae. Sirica, J.
Sept. 27	Plaintiffs' exhibits H, Z-1, Z-2, AA-1, AA-2, BB, CC-1, CC-2.
Sept. 27	Supplemental statement of plaintiffs of genuine issues.
Oct. 2	Memorandum of Amicus Curiae National Association of Supervisors of State Banks; appendices A, B, C, D.
Oct. 5	Opposition of defendant Saxon to cross-motion of intervening plaintiff Jeansonne for summary judgement; statement.
Oct. 10	Motion of defendant Comptroller for summary judgment, cross motion of plaintiffs for summary judgment, motion of intervening defendant for summary judgment, cross motion of intervening plaintiff for summary judgment, and motion of defendant Comptroller to dismiss heard and taken under advisement (Rep. G. R. Walker). McLaughlin, J.
Nov. 5	Memorandum granting cross-motions for summary judgment of plaintiffs and intervening plaintiffs; denying motions for summary judgment of defendant and intervening defendant and denying cross-motion to dismiss of defendant. McLaughlin, J.

Date	Proceedings
1962	
Nov. 16	Transcript of proceedings 10-11-12, Volume 1, pages 1-123 (Rep. G. Russell Walker) (court copy).
Nov. 23	Objections of intervening defendant to proposed order for summary judgment; memorandum.
Nov. 26	Objections of defendant Saxon to form of proposed order for summary judgment and Judgment.
Dec. 5	Findings of fact and conclusions of law. McLaughlin, J.
Dec. 5	Order denying defendant's and intervening defendant's motions for summary judgment and defendant's motion to dismiss; granting plaintiffs' and intervening plaintiffs' cross-motions for summary judgment; ordering that defendant Comptroller of Currency may not issue a certificate of authority to intervening defendant and permanently enjoining such issuance; undertaking discharge; with costs. McLaughlin, J.
1963	
Jan. 31	Notice of appeal of intervening defendant, Whitney National Bank in Jefferson Parish.
Feb. 1	Notice of appeal of defendant.
Feb. 7	Cost bond on appeal of Whitney National Bank in amt. of $250.00 with The Fidelity & Casualty Co. of New York approved. (fiat) Jones, J.

Filed June 9, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

[Title Omitted]

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTION

1. Plaintiff, Bank of New Orleans and Trust Company, is a banking corporation duly organized and existing under and pursuant to the laws of the State of Louisiana. Said plaintiff, a State bank, maintains its principal office and banking branches entirely within the City of New Orleans, Parish of Orleans, State of Louisiana, and at these banking facilities, so located and limited, serves and depends upon the banking business of customers and depositors resident and located principally in the Parishes of Orleans and Jefferson, State of Louisiana.

2. Plaintiff, Merchants Trust and Savings Bank, is a banking corporation duly organized and existing under and pursuant to the laws of the State of Louisiana. Said plaintiff, a State bank, maintains its banking offices and facilities entirely on the East Bank of the Mississippi River in the Parish of Jefferson, State of Louisiana, and at these facilities, so located and limited, serves and depends almost entirely upon the banking business of customers and depositors resident or located in the Parish of Jefferson, State of Louisiana.

3. Plaintiff, Guaranty Bank and Trust Company, of Lafayette, Louisiana, is a banking corporation organized and existing under and pursuant to the laws of the State of Louisiana and maintains banking offices and facilities in Lafayette Parish, State of Louisiana, which Parish is very close to the Parishes of Jefferson and Orleans, and said bank joins as a plaintiff herein because the orders and actions of the defendant herein complained of will have a serious adverse effect upon and will cause irreparable damage to its banking business, limited by law to its Parish as aforesaid.

4. Defendant is the Comptroller of the Currency, an offi-

cer of the United States Government, appointed to serve and serving under and pursuant to the provisions of *Title 12 U.S.C. § 1, et seq.*, and defendant, who maintains his office in the District of Columbia, is an "agency" of the said United States Government within the meaning of *Title 5 U.S.C. § 1001, et seq.*, and defendant is sued herein in his capacity as such Comptroller of the Currency.

5. The jurisdiction of this Court over this action is predicated upon the provisions of *Title 28 U.S.C. § 1331*, this being an action arising under the laws of the United States wherein the matter in controversy exceeds the sum of value of $10,000., exclusive of interest and costs; and upon the provisions of law which grant to this Court the jurisdiction and power to render declaratory judgments, restraining orders and injunctions in proper cases; and upon the provisions of *Sections 11-305* and *11-306* of the District of Columbia Code (1961 Edition) which grant to this Court general jurisdiction over all cases in law and equity between parties, either of which shall be resident or found within the District of Columbia and which involve an amount in controversy, exclusive of interest and costs, in excess of $3,000.

6. This action arises under *Sections 27 and 36* of Title 12 of the United States Code, commonly referred to as the National Banking Act, and under other provisions of federal law found in *Title 12 U.S.C. § 1841, et seq.*, commonly referred to as the Bank Holding Company Act. As hereinabove and hereinafter set forth, plaintiffs are all engaged in the banking business in the State of Louisiana, where each has a very substantial investment in capital, property, equipment and good will, irreparable damage to which is imminently threatened by action of the defendant proposed and announced to be taken by him arbitrarily in direct contravention of the aforementioned provisions of Federal law and of provisions of the laws of the State of Louisiana to be referred to more specifically hereinbelow.

Plaintiffs pray herein (1) for a declaratory judgment that any issuance by the defendant Comptroller of the Currency of a Certificate of Authority to Commence Banking in the Parish of Jefferson, State of Louisiana to the Whitney National Bank of New Orleans, the Whitney Holding Corporation of New Orleans and or the Whitney National Bank of Jefferson Parish would be unlawful and void under

Title 12 U.S.C. § 36 and *Title 12 U.S.C. § 1841, et seq.*, and would constitute an unlawful, arbitrary abuse of discretion and authority in violation of *Title 12 U.S.C. § 27*, and (2) for preliminary and permanent injunctions to enjoin the defendant Comptroller of the Currency from issuing to the said Whitney National Bank of New Orleans, the Whitney Holding Corporation of New Orleans and/or the Whitney National Bank of Jefferson Parish any Certificate or Certificates of Authority to commence banking business in the Parish of Jefferson, State of Louisiana.

7. Heretofore, and for a long period of years extending back approximately 79 years, the aforesaid Whitney National Bank of New Orleans has operated banking offices and facilities wholly within the City of New Orleans, Parish of Orleans, State of Louisiana; and said bank presently conducts such operations in the Parish of Orleans under a certificate or certificates issued to it by the Comptroller of the Currency under the National Banking Act (*Title 12 U.S.C. § 21, et seq.*). The said Whitney National Bank of New Orleans is by far the largest banking institution in the City of New Orleans and the State of Louisiana, and is one of the largest banks in the entire southern portion of the United States. On June 30, 1961, the said bank held approximately 39% of the total deposits in all banks in the Parish of Orleans, State of Louisiana, and 44% of all deposits of individuals, partnerships and corporations, albeit there are numerous other State and National banks with offices, banking facilities and branches throughout the said Parish.

In addition, while the said Whitney Bank holds and has maintained over the years a dominant position over all of the other banks combined in the City of New Orleans (Parish of Orleans), it has also managed to accumulate and hold in its banking facilities, *located in New Orleans (Parish of Orleans)*, deposits of individuals, partnerships and corporations *emanating from the East Bank of the Mississippi River in Jefferson Parish, Louisiana, (a parish or county beyond the limits of Orleans)*, in an aggregate amount exceeding 30% of all such deposits held by all banks having head banking offices and facilities in the very same East Bank area of said Jefferson Parish, Louisiana.

8. Under long standing provisions of the National Banking Act, national banks, such as Whitney National Bank, historically and steadfastly have been prohibited by law

from opening branches or additional banking offices or facilities in any county, parish or city, *other than that in which its main office or banking facilities are located*, unless State banks, i.e., banks chartered under the law of the State in which both types of banks (State and National), operate, are likewise authorized by State law so to expand. In this connection, *Title 12 U.S.C. § 63* provides in pertinent part:

"*Branch Banks*

"The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:

"(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks . . .

"(e) No branch of any national banking association shall be established . . . without first obtaining the consent and approval of the Comptroller of the Currency.

"(f) The term 'branch' as used in this section SHALL BE HELD to include *any branch bank, branch office, branch agency, additional office, or any branch place of business* located in any State . . . at which deposits are received, or checks paid, or money lent."—(Emphasis supplied.)

Moreover, *Title 12 U.S.C. § 27*, entitled "*Certificate of Authority to commence banking*", provides that before granting any certificate to any national bank authorizing the commencement of business at any location, the Comp-

troller shall determine whether such bank has complied with all the provisions required to be complied with before commencing the business of banking", and said section of the National Banking Act then provides:

> "But the Comptroller may withhold from an association his certificate authorizing the commencement of business, *whenever he has reason to suppose that the shareholders have formed the same for any other than the legitimate objects contemplated by this chapter.*" (Emphasis supplied.)

9. The laws of the State of Louisiana *do not* authorize State Banks to establish, operate and expand new branch or additional banking facilities to any point within the State. On the contrary, the statutes of Louisiana (*La. Rev. Stat. 6:54, 328*), as written and as historically applied by the Louisiana Banking Commissioner, expressly prohibit any bank with more than $100,000. capital from opening a branch or an additional banking facility in any parish (i.e., county), beyond the parish in which its main office is located, if another bank is already located and operating in the parish into which the large bank would like to expand. Plaintiff, Merchants Trust and Savings Bank, and others are already located and operating in Jefferson Parish, Louisiana, and have invested large amounts of capital in their facilities so located in reliance upon said protections of the law.

10. Upon information and belief, at all times hereinafter mentioned, the existence and contents of the above referred to provisions of the National Banking Act and the laws of Louisiana were and continue to be well known to defendant herein, the Comptroller of the Currency, by his predecessor in office, and to the management of the aforementioned Whitney National Bank of New Orleans.

11. Upon information and belief, heretofore and in or about 1959 or earlier, and in the face of complete knowledge of the aforementioned federal and state statutory prohibitions, the management of the Whitney National Bank of New Orleans commenced to consider and study ways and means whereby the said Whitney National Bank might attempt to evade and circumvent the said federal and state statutes involved, and proceed to locate and operate addi-

tional new branch bank facilities beyond the limits of the Parish of Orleans and within that part of Jefferson Parish on the East Bank of the Mississippi River wherein plaintiff, Merchants Trust and Savings Bank, among others, had already invested very large sums of capital and had established and were operating, and had been developing over the years, under authority issued by the State of Louisiana, extensive and complete banking facilities.

12. Finally, after giving full consideration to various legal maneuvers which might be attempted so as to gain the required Certificate of Authority from the Comptroller of the Currency in the District of Columbia for the opening of one or more such new branch bank facilities in Jefferson Parish, the management of the Whitney National Bank of New Orleans fashioned and adopted the following device as a basis for an attempt at evasion and circumvention of the said federal and state statutes, and application was made to the Comptroller of the Currency, under the very same federal statute involved, for approval and issuance of a certificate whereby, after all of the proposed evasion maneuvers were completed, would authorize Whitney National Bank of New Orleans to open and operate new branch bank facilities in Jefferson Parish, Louisiana. The proposed method for evading the laws of the United States and the State of Louisiana prohibiting branch bank facilities beyond parish lines is as follows:

Step 1. Whitney National Bank would cause to be organized a Louisiana corporation called "Whitney Holding Corporation". The sole initial capital investment in this corporation would be $350,000.—every cent of which (other than directors' qualifying shares) was to come from the capital funds of the Whitney National Bank. In return for this investment, the Whitney Bank was to receive 5,600 shares of stock of Whitney Holding. These 5,600 shares would be distributed to the stockholders of the Bank as a stock dividend (1-20 share in the Holding Corporation for each share held by the stockholder in the Bank).

Step 2. Whitney National Bank would cause to be organized a "*phantom*" or *non-operating* bank in the City of New Orleans, Parish of New Orleans, under the name "Crescent City National Bank", to which the Comptroller of the Currency would issue a National banking charter with full

knowledge that said Crescent City National Bank was created solely for the purpose of merging the existing Whitney into said non-operating bank. The Holding Corporation would then invest the entire $350,000. it received from Whitney National Bank in this new "phantom organization", in exchange for all of its authorized stock (112,000 shares, with par value of $2.50).

Step 3. The "phantom bank", Crescent, would then consolidate or merge *by written agreement* with Whitney National Bank. The stock in "Crescent" would continue to be held by the Whitney Holding Corporation, but then the Holding Corporation would exchange the balance of its stock with the stockholders in Whitney National Bank, *so that the Holding Corporation would then own all of the stock in Whitney National Bank and, in turn, the stockholders in Whitney National Bank would then own all of the stock in Whitney Holding Corporation.*

Step 4. Then, when this conduct process of evasion had been completed, Whitney National Bank would provide an additional $650,000. from its capital account to Whitney Holding Corporation, which funds would be used by the Holding Corporation to create the branch bank in Jefferson Parish to be called Whitney National Bank of Jefferson Parish. All stock in the branch bank, so organized, would be held by the Holding Corporation, and the branch would commence business, with $650,000 in capital supplied directly by the present bank in Orleans Parish, having completely contravened and evaded the prohibiting statutes.

13. Plaintiffs assert that the aforementioned scheme for evasion of federal and state banking laws is not only in direct violation of the letter and intent of *Title 12 U.S.C. § 36*, but it is also in violation of the intent of the following provisions of the Bank Holding Company Act, *Title 12 U.S.C. § 1841, et seq.:*

(i) *Title 12 U.S.C. § 1845*, which provides:

> "(a) From and after May 9, 1956, it shall be unlawful for a bank—
>
> "(1) to invest any of its funds in the capital stock, bonds, debentures, or other obligations of a bank holding company of which it is a subsidiary, or of any other subsidiary of such bank holding company. . . .

"(2) to make any loan, discount or extension of credit to a bank holding company of which it is a subsidiary of such bank holding company. . . ."

As alleged in Paragraph 13 of this complaint, the plan of the Whitney National Bank, a proposed subsidiary of the Whitney Holding Corporation, involves the investment (or extension of credit), of first $350,000 and then $650,000, or a total of $1,000,000 of the funds of the Whitney National Bank of New Orleans in the capital stock of a bank holding company of which it is a subsidiary.

(ii) *Title 12 U.S.C. § 1846*, which provides:

"*Reservation of rights to States*—The enactment by the Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to *banks*, bank holding companies, and subsidiaries thereof." (Emphasis supplied.)

The entire purpose of the instant scheme or device involving the establishment of Whitney Holding Corporation and the Holding Company's establishment of a bank in Jefferson Parish, was to prevent, evade and circumvent the State of Louisiana's historic power and statutory jurisdiction to prevent large banks, such as Whitney National Bank of New Orleans, from expanding across parish or county lines to open branches in a new parish or county in competition with smaller state banks already conducting a banking business in the latter parish or county, and thus, such device for evasion of the law was patently in contravention of the last mentioned provisions of the Bank Holding Company Act.

14. In spite of the foregoing, and after creating the corporate shells and devices required to effectuate the aforementioned evasion of the laws prohibiting branch banking across parish lines, Whitney National Bank of New Orleans, in company with the newly created Whitney Holding Corporation, applied to defendant herein, the Comptroller of the Currency, for approval of the various steps of the device leading to establishment of the branch bank in Jefferson Parish, Louisiana.

15. Upon information and belief, defendant, without hold-

ing hearings or seeking to obtain the views or testimony of any of the plaintiffs herein and after various of the employees and agents of his office conducted *ex parte* conferences and discussions with officers or representatives of the Whitney National Bank of New Orleans, and in spite of the aforementioned long standing prohibitions of federal and state law, approved the formation of the proposed "phantom bank", Crescent City National Bank in New Orleans, and the branch operation of the Whitney National Bank to be known as the Whitney National Bank in Jefferson Parish, but his approval was made subject to the approval of the Board of Governors of the Federal Reserve System to the acquisition of the shares in these two banks by the Whitney Holding Corporation.

16. Upon information and belief, the newly created Whitney Holding Corporation thereupon made application to the Federal Reserve Board for approval of such acquisition of shares; and upon receipt thereof, and in accordance with the provisions of *Title 12 U.S.C. § 1842(b)*, said Board gave notice of such application to defendant, the Comptroller of the Currency, and asked defendant to submit to the Board his views upon the lawfulness and desirability of the matters proposed.

17. Upon information and belief, defendant, the Comptroller of the Currency, charged with full knowledge of the aforementioned prohibitions and restrictions of the National Banking Act and of the laws of the State of Louisiana and of the Bank Holding Company Act and possessed of knowledge of the basic intent and purpose of the Whitney National Bank, by means of the device proposed in such application, to evade such laws, nevertheless made no effort and took no step to disapprove such application in accordance with the provisions of said *Title 12 U.S.C. § 1842(b)*. On the contrary, the said Comptroller of the Currency, upon information and belief, notified the Board that he favored the plans and proposals of the applicant and recommended approval of same.

Upon information and belief, this action on the part of defendant Comptroller of the Currency caused the Federal Reserve Board to forego the holding of a formal, statutory hearing on the application, as provided in *Title 12 U.S.C. § 1842(b)*, and enabled the President of the aforementioned Whitney National Bank of New Orleans and

Whitney Holding Corporation to make the following representations to the Board in support of the application:

> "Under present laws in our State, the Whitney is not permitted to establish branches outside the Parish of Orleans. . . .
>
> "The management of the Whitney National Bank has been studying and weighing alternative methods of entering Jefferson Parish to serve our present customers who have moved their plants there, or who have gone there to live and to participate in the further growth of that area. . . .
>
> "The officers of the Whitney National Bank determined in 1960 that the holding company was the proper solution, provided we could put the ownership of the present Whitney National Bank of New Orleans stock into such a company and, by the use of Whitney assets, establish a bank in Jefferson Parish, which would likewise be fully owned by the holding company.
>
> "*The Comptroller of the Currency has concurred in a program which has the effect of putting the ownership of the present Whitney National Bank stock into the Whitney Holding Corporation, through this Crescent City National Bank that was mentioned, and to the establishment of the Whitney National Bank in Jefferson Parish with funds from the present Whitney National Bank, the stock in which would be also owned by the holding company.*" (Emphasis supplied.)

18. On the basis of this record, the Federal Reserve Board, on May 3, 1962, issued an order approving the application of Whitney Holding Corporation to acquire the shares in the Whitney National Bank in New Orleans and its new branch in Jefferson Parish, Louisiana.

Plaintiffs herein are petitioning the Federal Reserve Board for reconsideration of this order and are requesting the Board to vacate its said order and to schedule this matter for formal hearing under the Bank Holding Company Act. Plaintiffs represent to the Court that, if the Board fails to grant the relief requested, plaintiffs intend to apply for review of said Board's order in the United States Court of Appeals for the Fifth Circuit, as provided by *Title 12 U.S.C. § 1848*, such application to be

filed within 60 days of May 3, 1962, the date upon which the said Order was entered.

19. Thereafter, and under date of May 18, 1962, defendant herein, the Comptroller of the Currency, entered his formal approval of the consolidation of Whitney National Bank of New Orleans with the Crescent City National Bank, effective May 24, 1962, and is presently considering almost immediate issuance of his Certificate or Certificates of Authority which will enable the new branch bank facility to open and commence to operate a banking business at one or more locations in Jefferson Parish under the name of Whitney National Bank of Jefferson Parish.

20. Plaintiffs verily believe that defendant, unless enjoined, will, without any notice of intention to plaintiffs, issue in the name of Whitney National Bank of New Orleans, or Whitney Holding Corporation, or Whitney National Bank of Jefferson Parish the aforesaid Certificate or Certificates of Authority, all in contravention of the letter, intent and purposes of *Title 12 U.S.C. §§ 27, 36 and 1841, et seq.*, and that after said Certificate or Certificates are issued as aforesaid, plaintiffs will have no adequate remedy at law, either to compel revocation of same or to prevent the Whitney Bank from so operating in Jefferson Parish.

21. Plaintiffs further allege that the unlawful and arbitrary issuance by defendant of his certificate or certificates, authorizing the Whitney National Bank to open and operate a new branch facility or facilities in Jefferson Parish as aforesaid will cause great and irreparable damage to the banking business of said plaintiffs for the following reasons:

(a) Plaintiff, Bank of New Orleans and Trust Company, a State bank chartered under the laws of Louisiana to conduct a banking business limited to a main office and branches wholly within the Parish of Orleans, has a total capital of approximately $1,562,500.; total resources of $62,719,121.; surplus of $1,437,500. and undivided profits of $383,892. Under the laws of Louisiana, this plaintiff, a relatively small competitor of the Whitney National Bank of New Orleans in the banking business in the Parish of Orleans (Whitney, for example, is believed to possess undivided profits of approximately $13,835,000 and $27,200,-

000 in its surplus account), cannot by law, expand its facilities to open and operate a new branch facility beyond the boundaries of the Parish of Orleans in Jefferson Parish. And, yet, because the Parish of Jefferson is contiguous to the Parish of Orleans, many of said plaintiff's depositors and borrowers in New Orleans are persons and businesses residing and located in Jefferson Parish, who maintain deposits or loan accounts at this plaintiff's offices within the Parish of Orleans. This plaintiff alleges and verily believes that one of the primary purposes of the application of the Whitney National Bank before the defendant for the authority to open and operate new branch facilities in Jefferson Parish is to attempt to divert and appropriate to itself a substantial part of the banking business and services now enjoyed by this plaintiff and other New Orleans State banks similarly situated from sources in Jefferson Parish. Thus, the unlawful issuance of a certificate by defendant to said Whitney National Bank, would cause the plaintiff to suffer severe, irreparable damage, including the loss of customers' business, deposits and consequent loss of profit or net income. Moreover, this plaintiff would be irreparably damaged by the inability to continue to compete with the said Whitney National Bank on an equal footing as far as location of facilities are concerned, and would be prevented by laws of the State of Louisiana, from any appropriate relief or remedy in the premises.

(b) Plaintiff, Merchants Trust and Savings Bank, a State bank chartered under the laws of Louisiana to conduct a banking business limited by law to facilities wholly within the boundaries of the Parish of Jefferson, has capital and resources, surplus and undivided profits approximately as follows:

Capital	$ 187,500.
Resources	$7,717,660.
Surplus	$ 212,500.
Undivided Profits	$ 62,914.

Said plaintiff is limited by law to conducting a banking business with facilities confined to Jefferson Parish. This plaintiff may not expand into the Parish of Orleans to compete, through branches there, with the Whitney National

Bank for business in that Parish. Thus, being a relatively small banking institution, this plaintiff and others like it in Jefferson Parish must look almost exclusively to banking business and deposits emanating from customers and business firms located in Jefferson Parish. Said plaintiff alleges and verily believes that one of the primary purposes of the application of the application of the Whitney National Bank before the defendant is to attempt to divert and appropriate to itself a substantial part of the banking business and services now enjoyed and developed over a long period of years by this plaintiff from sources on the East Bank of the River in Jefferson Parish. Thus, the unlawful issuance of a certificate by defendant to said Whitney National Bank would cause plaintiff to suffer severe, irreparable damage, loss of customers' business, deposits, and consequent loss of profit or net income. Furthermore, the unlawful granting of such certificate would bring to bear on this small bank, and numerous others in Jefferson Parish like it, new, wholly uncontemplated competition from the combined resources, deposits and lending power of the very largest bank in the entire State of Louisiana, and such competition, in contravention of law, will irreparably damage the entire business of all such banks presently doing business in Jefferson Parish.

(c) Plaintiff, Guaranty Bank and Trust Company of Lafayette, Louisiana, is likewise a State bank chartered under the laws of Louisiana to conduct a banking business limited by law to a main office and branches in Lafayette Parish, Louisiana, very near the Parish of Jefferson. This plaintiff's financial investment and resources are as follows:

Capital	$ 600,000.
Resources	$23,153,556.
Surplus	$ 600,000.
Undivided Profits	$ 1,079,999.

This plaintiff alleges and verily believes that one of the primary purposes of the application of the Whitney National Bank before the defendant is to destroy the statutory prohibitions, both federal and state, which have prevented the said Whitney Bank, the largest in the State of Louisiana, from expanding throughout various parishes in the State of Louisiana and from opening branch facilities,

through the medium of a holding company, at different points, including places possibly in the parish in which this plaintiff has conducted and developed its business. Any such expansion would bring to bear upon plaintiff, a very small banking organization by comparison, destructive competition backed by the combined capital, resources and lending power and authority of the Whitney National Bank and its various branch facilities. Under the laws of the State of Louisiana, plaintiff could not compete and meet any resulting loss of business by opening branches of its own in some other parish in the State. Thus, plaintiff would likewise suffer irreparable damage from the unlawful issuance of a certificate by the defendant herein.

(d) All of the plaintiffs herein allege and verily believe that there already exist in Jefferson Parish, Louisiana ample, modern and complete banking facilities, sufficient to serve the public interest, convenience and necessity in that Parish, and that the investments in such facilities, made in reliance upon the protective provisions of federal and State law, would be irreparably damaged if defendant were unlawfully to permit the Whitney National Bank to establish new branch facilities therein.

WHEREFORE, plaintiffs pray (a) that this Court enter judgment herein declaring that the defendant Comptroller of the Currency is prohibited by Title 12 United States Code, Sections 27, 36 and 1841, et seq. from issuing to the Whitney National Bank, and/or the Whitney Holding Corporation and/or the Whitney National Bank of Jefferson Parish, a Certificate or Certificates of Authority authorizing them or any of them to establish new branch bank facilities in the name of the Whitney National Bank or otherwise in Jefferson Parish, State of Louisiana; and, (b) in order to prevent immediate and irreparable injury, loss and damage to plaintiffs herein, that this Court grant a preliminary injunction and permanent injunction herein, restraining and enjoining defendant, the Comptroller of the Currency, from issuing to the Whitney National Bank, also known by the name of Crescent City National Bank, the Whitney Holding Corporation and/or the Whitney National Bank of Jefferson Parish, a Certificate or Certificates of Authority authorizing the establishment of new branch bank facilities by them or any of them in the name of Whitney Na-

tional Bank or otherwise in Jefferson Parish, State of Louisiana, and, (c) that this Court grant such other and further relief as may seem just and proper and as the exigencies of the case may demand.

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JAMES W. BEAN, ESQ.,
Bean & Rush, Esqs.,
Lafayette, Louisiana.

Of Counsel

Filed June 9, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

[Title omitted]

MOTION FOR PRELIMINARY INJUNCTION

Come now the plaintiffs herein by undersigned counsel and respectfully move this Court to grant a preliminary injunction restraining the defendant from issuing his Certificate or Certificates authorizing the establishment and operation by the Whitney National Bank of New Orleans, the Whitney Holding Corporation of New Orleans, Louisi-

ana and/or the Whitney National Bank of Jefferson Parish, Louisiana, of a new branch bank or banks within Jefferson Parish, State of Louisiana; and, in support of such motion, direct the Court's attention to the Complaint herein; the Affidavit of plaintiffs' counsel, submitted in support of this Motion and the Motion for Temporary Restraining Order herein; and the points and authorities filed simultaneously herewith.

WHEREFORE, plaintiffs pray the Court to hear this motion promptly and to issue a preliminary injunction restraining defendant from issuing his Certificate or Certificates above described, pending the hearing and determination of the complaint herein.

EDWARD L. MERRIGAN,
Attorney for Plaintiffs,
425 13th St., N.W.,
Washington, D.C.

RALPH FISHMAN, ESQ.,
SESSIONS, FISHMAN, ROSENSON & SNELLINGS, ESQS.,
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Of Counsel.

Filed June 9, 1962

UNITED STATES DISTRICT COURT, DISTRICT OF COLUMBIA

Civil Action No. —

[Title omitted]

AFFIDAVIT IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

CITY OF WASHINGTON,
District of Columbia, ss:

Edward L. Merrigan, being duly sworn, deposes and says:

1. I am an attorney duly admitted to practice before the District Court of the United States for the District of Columbia, and I am the attorney for plaintiffs in this action. This affidavit is submitted in support of plaintiffs' motion for a preliminary injunction herein.

2. At the request and direction of the plaintiff banks herein, I have filed a Complaint for Declaratory Judgment and Injunction, the purpose of which is to restrain and enjoin defendant, the Comptroller of the Currency, from issuing a Certificate or Certificates authorizing the establishment and operation of one or more new branch banks of the Whitney National Bank of New Orleans in Jefferson Parish, Louisiana. At the same time, I filed a Motion for Preliminary Injunction to restrain the defendant from issuing any such certificate or certificates during the pendency of this action.

3. The basis of the aforesaid Complaint and Motions is that defendant Comptroller of the Currency is prohibited by Title 12 United States Code, Sections 36 and 1841, et seq. from authorizing the direct or indirect establishment of new branch bank or banks by the aforesaid Whitney National Bank in Jefferson Parish, Louisiana, and that said defendant's announced approval of such proposal and his announced purpose and plan to issue a Certificate or Certificates authorizing the establishment and operation of such new branch bank or banks in Jefferson Parish, Louisiana constitutes arbitrary and wilful abuses of his discretion in violation of the provisions of Title 12 United States Code, Section 27.

4. On October 27, 1961, the President of the Whitney National Bank of New Orleans, Mr. Keehn W. Berry, wrote

a letter to the shareholders of the said bank, announcing that the bank "had been working for some time to obtain the necessary approval of the Comptroller of the Currency . . . to the steps required to create a Holding Company into which the stock of the Whitney National Bank would be converted and that we then contemplated moving funds from the Whitney National Bank of New Orleans into the Holding Company for the establishment of a Whitney National Bank in Jefferson Parish." He then stated that "we now have the concurrence of the Comptroller of the Currency" to the initial steps of the proposed plan, and he proceeded to outline in detail the subsequent steps required to complete the manœuvers and camouflages adopted by the Bank in order to gain the defendant's final approval and certificate for establishment and operation of the new branch bank or banks. This letter concluded as follows:

> "Insofar as the operation in New Orleans is concerned, this program is simply a corporate reorganization of the present Whitney National Bank of New Orleans. It contemplates no changes in personnel, management, or directorship. It contemplates no changes in the facilities of the bank in New Orleans. It contemplates no changes in the ownership or proportional shareholdings."
>
> "The basic purpose of the program is to allow the Whitney organization in New Orleans to commence a Holding Company operation controlling a bank in East Jefferson Parish. . . ."

A copy of the said letter of October 27, 1961 is annexed hereto, made a part hereof and marked *Exhibit "A"*.

5. Thereafter, and on October 28, 1961, the very same President of the Whitney National Bank of New Orleans again wrote to the Bank's stockholders. In this letter, copy of which is annexed hereto, made a part hereof and marked *Exhibit "B"*, he stated:

> "As we have already said to you, for more than two years we have been studying and weighing alternative methods of our serving our customers who live beyond the city limits or who have built plants or opened offices there. A year ago the Directors of your Bank authorized the officers to proceed to ob-

tain the necessary approval of the Comptroller of the Currency . . . to the action required to create a holding company into which the stock of the Whitney National Bank would be converted and which holding company would create and own in its entirety a new bank to serve that part of Jefferson Parish on the East bank of the Mississippi.

"We are firmly convinced, after careful consideration of the alternatives, that your common ownership of all of the Whitney National Bank of New Orleans stock and all of the stock of a Whitney National Bank in Jefferson Parish by a holding company to be owned by you is the soundest method of pooling all of the deposits of our customers and of our capital funds for their use and for the development of this community. From the depositors' point of view, those in the smaller bank will be assured of the same management which directs the large one without possibility of interruption. They will be assured of access to the large loan limits of the combined banks. They will have the security which arises out of the fact that the large and the small bank have identical ownership as well as management."

6. As alleged in the Complaint herein, Title 12 United States Code, *Section 36(c)(2)* *prohibits* a national banking association such as Whitney National Bank from establishing and operating new branches at any point within the State of Louisiana beyond the limits of the Parish of Orleans, where its main office is located, *unless*

> "such establishment and operation are at the time authorized to State banks by the statute law of the State . . . by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State or State banks."

Section 36(b) then defines "branch" as follows:

> "The term 'branch' as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State . . . at which deposits are received, or checks paid, or money lent."

Also, as alleged in the complaint, Louisiana law does not grant any authority, express or implied, to State banks to establish or operate branches "at any point within the State". On the contrary, the law of Louisiana prohibits banks with $100,000. or more in capital from opening so-called "outside branches" beyond the parish (county) lines within which the State bank's main office is located.

Finally, as stated in the Complaint, the Bank Holding Company Act, upon which the said Whitney Bank was apparently pinning its endeavor to evade the restrictions of the "Branch Bank" provisions of the National Banking Act, specifically provides, at *Title 12 United States Code, Section 1846:*

> "*Reservation of rights to States*—
>
> "The enactment by the Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has . . . with respect to banks, bank holding companies, and subsidiaries thereof."

Said Bank Holding Company Act, at *Title 12 U.S.C. § 1845 (a)*, also makes it *unlawful* for a bank to invest any of its funds in the capital stock, or other obligations of a bank holding company of which it is a subsidiary, or of any other subsidiary of such bank holding company". The same section makes it "unlawful for a bank to make a loan, discount or extension of credit to a bank holding company of which it is a subsidiary or to any other subsidiary of such bank holding company".

Exhibit "A" hereto states on its face that Whitney National Bank, as part of the plan before the defendant herein for approval is planning to invest $350,000. and later, an additional $650,000. in a bank holding company of which it is to be or is a subsidiary and/or in another subsidiary of such holding company, to wit, the Whitney National Bank's proposed branch in Jefferson Parish, Louisiana.

7. Not only do the foregoing provisions of federal and state law expressly prohibit the direct or indirect establishment and operation of such new branch bank facilities by the Whitney National Bank of New Orleans, but the National Banking Act itself, *Title 12 U.S.C., Section 27* specifically and expressly empowers the defendant herein, the

Comptroller of the Currency, to "withhold from an association his Certificate authorizing the commencement of business, whenever he has reason to suppose that the shareholders have formed the same for any other than the legitimate objects contemplated by this chapter," which chapter, of course, includes Section 36, referred to hereinabove.

Exhibit "A" hereto states in its very first and second and last paragraphs, that defendant herein has been fully and consistently advised by Whitney National Bank of New Orleans that the entire basic purpose and intent of the proposal laid before defendant for approval was to defeat, circumvent or evade the legitimate objects of the Branch Bank restrictions of Section 36, contained in the National Banking Act, which restrictions, together with the statutes of Louisiana, prevented said bank from opening one or more branches in a new parish, to wit, Jefferson Parish, Louisiana.

8. In spite of the foregoing provisions of law, and in spite of his apparent knowledge of the underlying purposes and designs of the proposals submitted to his office by the Whitney National Bank of New Orleans, the Comptroller of the Currency has proceeded to grant a series of written approvals with reference to each step of such program, and he is now verily believed to be ready to issue momentarily his formal Certificate of Authority under *Title 12 U.S.C. § 27* to authorize final establishment and operation of the unlawful new Jefferson Parish branch facilities of the Whitney National Bank of New Orleans. Under date of May 18, 1962, defendant issued a written decision announcing his approval of further steps in the Whitney's proposal. He refers therein to his approval of prior steps therein on October 2, 1961. A copy of defendant's said decision is annexed hereto, made a part hereof and marked *Exhibit "C"*.

In the meantime, as *Exhibit "D"* hereto recites, defendant has apparently been stating to various banking organizations in other sections of the United States that the restrictions and prohibitions of *Section 36 of Title 12 of the United States Code* are personally objectionable to him and that he is aware of and apparently sympathetic to devices designed to avoid same. Defendant is also reported in said Exhibit "D" to have recognized, however, that only the Congress of the United States can lawfully repeal or amend such provisions of law.

9. During the past week, your deponent has been advised verbally by agents and employees of the defendant herein that the defendant "has completed his consideration of the Whitney Bank case and is now ready to issue, without any further proceedings, a certificate authorizing the Whitney National Bank to open in Jefferson Parish, Louisiana". These same agents and employees of defendant stated that the certificate will issue immediately upon the said Whitney's request therefor, and that, without any question at all, the defendant herein intends to issue the certificate.*

10. The Complaint and the Motion for Temporary Restraining Order herein allege, and I verily believe, that after defendant issues his Certificate or Certificates to the Whitney National Bank, as threatened, plaintiffs will have no legal remedy effectively to prevent the establishment and operation of such new branch bank or banks in Jefferson Parish, Louisiana.

11. If defendant is not restrained immediately from issuing his Certificate or Certificates of authority to the said Whitney National Bank of New Orleans, Whitney Holding Corporation, or Whitney National Bank of Jefferson Parish, Louisiana, the said Bank will, as soon as it received defendant's said Certificate or Certificates, open for business and commence operation of one or more branch banks in complete and utter violation, evasion and contravention of both the Federal and State laws referred to hereinabove, all to the irreparable loss, injury and damage to the banking businesses of the plaintiffs, and each of them, as alleged in the Complaint herein, and such issuance by defendant will effectively deprive plaintiffs of any remedy against such unlawful, arbitrary and wilful action of the defendant.

s/ Edward L. Merrigan.

Sworn to and subscribed before me this 8th day of June, 1962.

s/ Rose M. Dennis,
Notary Public.

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* On June 8, 1962, however, General Counsel to defendant, when advised this suit would be filed, agreed to withhold the Certificate until this Court acts upon this motion.

Filed June 9, 1962

EXHIBIT "A"

WHITNEY NATIONAL BANK OF NEW ORLEANS

October 27, 1961

Keehn W. Berry
President

TO WHITNEY NATIONAL BANK SHAREHOLDERS:

REORGANIZATION PROGRAM

Under date of July 17, 1961, I explained to you that we had been working for some time to obtain the necessary approval of the Comptroller of the Currency and the Federal Reserve Board to the steps required to create a Holding Company into which the stock of the Whitney National Bank would be converted and that we then contemplated moving funds from the Whitney National Bank of New Orleans into the Holding Company for the establishment of a Whitney National Bank in Jefferson Parish.

We now have the concurrence of the Comptroller of the Currency to the establishment of a Crescent City National Bank with a capital of $280,000 and a surplus of $56,000 and paid in undivided profits of $14,000, or a total capitalization of the Cresent City National Bank of $350,000. The steps needed to consummate the change in our capital structure will be as follows:

1. We propose to put $350,000 of the capital funds of the Whitney National Bank into a Louisiana business corporation under the title—"WHITNEY HOLDING CORPORATION". The Whitney Holding Corporation will have an authorized capital of 1,120,000 shares of no par value stock. 5,600 of these shares will be issued to the Whitney National Bank of New Orleans for the $350,000. The Bank will immediately distribute these shares to all of its shareholders on the basis of 1 20th of one share for each share of the 112,000 shares of the Whitney National Bank stock outstanding.
2. The Whitney Holding Corporation will cause the or-

ganization of the Crescent City National Bank contributing $280,000 to capital, $56,000 to surplus, and $14,000 to undivided profits, and Whitney Holding Corporation will receive for that all of the authorized stock of Crescent City National Bank, being 112,000 shares of $2.50 par value.

3. Crescent City National Bank will enter into a consolidation agreement with the Whitney National Bank of New Orleans. Whitney Holding Corporation will execute an agreement which will be a part of the consolidation agreement. The consolidation agreement will provide for consolidation under national banking law as follows:

   a. All of the stock of the Crescent City National Bank will be retained by Whitney Holding Corporation except qualifying shares which will be sold to directors for cash.

   b. Whitney National Bank shareholders will surrender all shares which will be cancelled and they will receive 9-19/20 shares of Whitney Holding Corporation for each share held. These shares, together with the dividend described in Section 1 above, will give each present Whitney shareholder, ten shares of Whitney Holding Corporation stock for each share of Whitney Bank stock now held.

   c. All assets and liabilities of Whitney National Bank of New Orleans will be consolidated into the Crescent City National Bank under the Charter of the Crescent City National Bank and under the name of the Whitney National Bank of New Orleans. The par value of the stock of Crescent City National Bank will be simultaneously increased to $25.00 per share so that the capital structure of the new bank will be the same as that of the old.

   d. Dissenting shareholders of the Whitney National Bank of New Orleans will be entitled to a cash payment of the appraised value of the shares as provided by Federal Bank Law. In accordance with the same law, shares of Whitney Holding Corporation representing dissenting shareholders will be sold at public auction and the proceeds returned to the capital funds of Crescent City National Bank to the extent of funds used to pay the dissenting shareholders.

4. Upon appropriate notice and publication, the consolidation agreement will be submitted for approval by the shareholders of Whitney National Bank of New Orleans and shall become effective only upon the affirmative vote of not less than 2/3rds of the outstanding stock.
5. Upon completion of the consolidation Whitney Holding Corporation will own all of the stock, except directors qualifying shares, of the Crescent City National Bank (to be named Whitney National Bank of New Orleans). The outstanding shares of Whitney Holding Corporation will be 1,120,000 shares owned by all of the present Whitney Bank stockholders proportionately, except for dissenting shareholders.
6. The Crescent City National Bank (to be named Whitney National Bank of New Orleans) will provide $650,000.00 to Whitney Holding Corporation with which Whitney Holding Corporation will cause to be created the Whitney National Bank in Jefferson Parish, receiving all stock therefor, being 20,000 shares having a $25.00 par value. The initial capital structure will be $500,000 capital, $100,000 surplus, and $60,000 undivided profits. Whitney Holding Corporation will immediately sell to directors qualifying shares for cash.
7. The Whitney Holding Corporation will register under and operate in accordance with the Bank Holding Company Act of 1956 and other applicable laws, under which it can acquire no additional banks without approval of the Board of Governors of the Federal Reserve. There are no present plans for additional acquisitions.

Insofar as the operation in New Orleans is concerned, this program is simply a corporate reorganization of the present Whitney National Bank of New Orleans. It contemplates no changes in personnel, management, or directorship. It contemplates no changes in the facilities of the bank in New Orleans. It contemplates no changes in the ownership or proportional shareholdings.

The basic purpose of the program is to allow the Whitney organization in New Orleans to commence a Holding Company operation controlling a bank in East Jefferson Parish to protect Whitney's competitive position in that area into which many of Whitney's present customers have moved.

This detailed outline of the main features of the con-

solidation program is sent to you in accordance with the prescribed procedure in the regulations of the Comptroller of the Currency.

Sincerely,

K. W. BERRY,
President.

KWB:p.

Filed June 9, 1962

EXHIBIT B

WHITNEY NATIONAL BANK OF NEW ORLEANS

October 28, 1961

Keehn W. Berry
President

TO WHITNEY NATIONAL BANK SHAREHOLDERS:

You are hereby notified of a Special Shareholders' Meeting of the Whitney National Bank called by the Board of Directors to be held on November 29, 1961 at 12 o'clock noon at the offices of the Bank at 228 St. Charles Street, New Orleans, Louisiana.

The purpose of the meeting is to consider and determine by vote whether to ratify and confirm the Whitney Holding Corporation program by consolidating the Whitney National Bank into the Crescent City National Bank in New Orleans under the name of the former, and all matters incidental thereto.

We are enclosing a letter in accordance with the requirements of the United States Comptroller of the Currency which outlines in detail the proposed program. It is important to bear in mind that under the plan all authorized shares of the Whitney Holding Corporation will be distributed to you, the stockholders of the Whitney National Bank, in exchange for your presently held stock. You will then own the same proportionate interest as you now have in the Whitney National Bank in all the assets of the holding corporation, which then obviously includes all of the assets of the present Whitney National Bank. Control of the Holding Corporation management will rest as it should with the holders of a majority of the stock.

As we have already said to you, for more than two years

we have been studying and weighing alternative methods of our serving our customers who live beyond the city limits or who have built plants or opened offices there. A year ago the Directors of your Bank authorized the officers to proceed to obtain the necessary approval of the Comptroller of the Currency and the Federal Reserve Board to the action required to create a holding company into which the stock of the Whitney National Bank would be converted and which holding company would create and own in its entirety a new bank to serve that part of Jefferson Parish on the East bank of the Mississippi.

We are firmly convinced, after careful consideration of the alternatives, that your common ownership of all of Whitney National Bank of New Orleans stock and all of the stock of a Whitney National Bank in Jefferson Parish by a holding company to be owned by you is the soundest method of pooling all of the deposits of our customers and of our capital funds for their use and for the development of this community. From the depositors point of view, those in the smaller bank will be assured of the same management which directs the larger one without possibility of interruption. They will be assured of access to the large loan limits of the combined banks. They will have the security which arises out of the fact that the large and the small bank have identical ownership as well as management.

We therefore elected to use a holding company rather than to get a group of stockholders to form an affiliate in Jefferson Parish. An affiliate by law must depend on ownership of a majority of the stock in the Jefferson Parish bank by Whitney Bank stockholders. Affiliate relationship can be suddenly terminated if stock ownership in the Jefferson Parish bank changes over a period of time until control ceases to be in the stockholders of the large New Orleans bank. The large bank cannot control those changes in stock ownership, and under the law when the control ceases to be in the stockholders of the large bank the two banks cannot have common officers or directors. As we view it, the change of ownership of the stock could be very embarrassing to either or both banks,—even to the extent of having a bank which we no longer control still bearing the name "Whitney National Bank".

Under the holding company approach the relationship is completely owned by the stockholders of the holding com-

pany who will be all the present stockholders of the Whitney National Bank and their successors.

By reason of the common ownership of the two banks in a holding company there can arise no conflict of interest between them as there can between affiliated banks. There will be no minority stockholders to be affected.

From the customer point of view there will be no conflict of interest arising out of the manner in which the customer sees fit to divide his business between the commonly owned banks in the two parishes. He will have the full benefits of a relationship with the large bank and its officers.

Because of the permanent relationship between the large and the smaller bank, the smaller one can operate safely with a smaller capitalization.

The corporate identity of the seventy-eight year old Whitney National Bank with the prestige and asset values inherent therein, is fully preserved under the holding company procedure, as is your undiluted ownership thereof.

Finally, this holding company group broadens banking possibilities for the future from the point of view of our shareholders. Even more important it will give metropolitan New Orleans the soundest form of banking unit which can accumulate and pool banking resources in this community where they can be used to greatest advantage in the further development of the entire area.

For the reasons stated, we strongly recommend that you support your Directors' proposal for the establishment of the Whitney Holding Corporation in accordance with the Plan enclosed herewith. Please sign and return promptly the enclosed proxy whether or not you plan to attend the meeting in person. If you attend, you may still vote in person.

Sincerely yours,

K. W. Berry,
President.

Filed June 9, 1962

Exhibit "C"

TREASURY DEPARTMENT
Comptroller of the Currency
Washington 25, D. C.

DECISION OF COMPTROLLER OF THE CURRENCY JAMES J. SAXON ON THE APPLICATION TO CONSOLIDATE WHITNEY NATIONAL BANK OF NEW ORLEANS, NEW ORLEANS, LOUISIANA, AND CRESCENT CITY NATIONAL BANK, NEW ORLEANS, LOUISIANA.

STATEMENT

Application has been made to the Comptroller of the Currency for permission to consolidate the Whitney National Bank of New Orleans, New Orleans, Louisiana, and the Crescent City National Bank, New Orleans, Louisiana.

Application had previously been made to this office to organize two new national banks: one, located in New Orleans, to be known as the Crescent City National Bank and the other, located in Jefferson Parish, to be known as the Whitney National Bank in Jefferson Parish. Substantially all of the stock of the new banks would be acquired by the proposed Whitney Holding Corporation.

This office approved the formation of the two banks on October 2, 1961. Subsequently, on May 3, 1962, the Board of Governors of the Federal Reserve System granted approval to the Whitney Holding Corporation to acquire substantially all the shares of these banks.

We find the proposal to consolidate to be in the public interest. The application, therefore, is approved effective on or after May 24, 1962.

JAMES J. SAXON,
Comptroller of the Currency.

Dated: May 18, 1962

Filed June 9, 1962

Federal Law Needed?

Comptroller Saxon Criticized in Illinois for Statements on Branch Banking

Illinois bankers, the majority of whom have strongly objected to any and all proposals for branch banking in the state, lashed out at Comptroller James J. Saxon last month because of his recent statements concerning federal legislation affecting branch banking.

Critical statements were issued by the president of the Illinois Bankers Association, the IBA's newly elected executive vice president, and by members of various groups as they assembled for annual meetings.

IBA President Jacob W. Myers (pres., Corn Belt Bank, Bloomington) reaffirmed the association's official opposition to branch banking. He stated that the IBA would fight any national legislation that would permit *national* banks to establish branches, and he also said that any effort to legalize branch banking through state legislation also would be strongly opposed.

Mr. Myers, referring specifically to Comptroller Saxon's suggested branching law for national banks, stated:

> "This is another example of encroachment by the federal government in the field of state authority.
>
> "The bankers of Illinois bitterly resent this type of federal intervention in an area which has traditionally been a prerogative of the state."

The Comptroller's statements, which have caused him so much embarrassment in his home state (he was an attorney for the First National of Chicago prior to his appointment as Comptroller), were made late in January in connection with proposed "acquisitions" by New York City banks in adjacent counties.

The Comptroller, in denying these acquisitions, stated in a letter of explanation to the board of governors of the Federal Reserve System that he was doing so because he felt that "massive acquisitions" by New York City banks were not the proper ways for them to expand into adjacent counties. He regretted, he said, that the laws of New York,

as well as the laws of many other states, artificially inhibit normal proper and publicly beneficial growth and expansion through branching. Because of these restrictions, he said, banks are forced to resort to "unusual means in order to some way accommodate banking growth and expansion."

> Under these circumstances, he said, "we believe it to be imperative that the Congress promptly be asked to amend Section 36 of the National Bank Act relating to branches so as to liberalize substantially the present authority and thereby also to develop a more consistent statutory policy in respect to branching in all of the states."

The Comptroller also stated "The Bank Holding Company Act should also be amended in at least two major respects. (a) To make clear that this Act supersedes *all state statutes* now or hereafter in force, and (b) to eliminate exemptions presently in the Act so as . . . to assure that no organization owning banks is free of regulation pursuant to the Act as is presently the case."

Roland Blaha, the IBA's new executive vice president, stated that he was strongly opposed to the Comptroller's proposal on the grounds that it would have the effect of superseding the constitution of the state of Illinois. The authority of the state legislature would be by-passed, he said, and a peoples' referendum on the problem would be meaningless.

If the Comptroller's recommendations should be enacted into law, said Mr. Blaha, who had served as Illinois's supervisor of banks before accepting his new post, then national banks could establish branches in Illinois, but it would be 1965 before state banks in Illinois could be placed on an equal footing.

A statement issued by James C. Downs, chairman of the Illinois County for Branch Banking, supported Mr. Blaha's stand on the Comptroller's proposal.

Although the council would continue to work for branch banking legislation in Illinois, Mr. Downs stated that "we feel that such action should be taken at the state level. Our own state legislators should no longer delay," he said, "in taking the initiative *in advance of federal action* so that the people of Illinois may make their *own* decision in a state-wide referendum."

The council has been advocating limited branch banking

for the state, permitting any bank to establish branches within 15 miles of its home community, but not within one mile of an existing bank.

IBA members at group meetings also reaffirmed the association's position on branch banking and adopted resolutions criticizing the Comptroller's proposal. Such a proposal, they said, was an "usurpation of the laws of the state of Illinois."

The IBA position also was enthusiastically endorsed by J. Ross Humphreys, who is scheduled to succeed Mr. Myers as IBA president next month. Said Mr. Humphreys, who is president of Chicago's Central National Bank:

"Such an action would completely ignore our state law and void certain provisions of our state constitution.

"The citizens of Illinois, by public referendum in 1924, voted to outlaw branch banking, and efforts in the last two sessions of our state legislature to legalize branch banking have been overwhelmingly defeated."

NEW YORK—The Bank of New York promoted five officers and appointed four new officers March 12. They are Morgan E. McMonegal, advanced to assistant vice president; George W. Scott and Harold G. Wilson, to trust officers; Joseph A. Agolia, to assistant trust officer; William J. Caird, to assistant comptroller; Donald M. Long and Wesley V. Taylor, to assistant secretaries; Walter H. Cushman, to manager, trust operations; and James G. Davine, to manager, securities.

In finance

New 'branch banking' battle flares, as Oklahoma issue goes to Fed.

A battle over "branch banking"—with overtones of national significance—flared up this week in Oklahoma. The state has a ban on branching, with the exception of so-called banking "facilities" within 1,000 ft. of a main office. But First National Bank & Trust Co., Oklahoma City's largest bank, has applied to the Federal Reserve Board for permission to get around the law by setting up a bank holding company. Fed. hearings are slated to begin June 5.

First National's partner in the transaction is a tiny bank in the southeastern corner of the state, Idabel National Bank, which has only about $5-million in assets. Oklahoma

bankers say that a green light for First National would touch off a flood of other holding company applications, including several from banks now bitterly opposed to First National's deal. First National itself makes no secret of its desire to build a statewide holding company system.

The issue has national importance because of the Fed's apparent tendency to override state laws in ruling on bank expansions in New York and in Louisiana [BW May 12 '62 p. 32]. In the latter case, the Fed allowed Whitney National Bank, largest in New Orleans, to expand into a neighboring parish through the holding company route, despite a state ban on branching.

Meanwhile, the celebrated dispute between the Justice Dept. and two Philadelphia banks. Philadelphia National and Girard Trust Corn Exchange—which want to merge to form the city's largest bank—moved into the Supreme Court. For the first time, the court will be asked to spell out just how the Sherman and Clayton Acts apply to banking.

Great Northern Paper pledges help to Georgia pulp and paper group

In 1957, a group of back-country Georgia bankers and landowners set out to put themselves into the pulp and paper business.

This week, after a five-year campaign in which roughly $22 million in stock was sold door-to-door across the state, the promoters were close to success and had some big profits to show for it. They had one of the nation's most highly automated kraft linerboard paper mills well under construction, a pledge of $15-million in new equity from Great Northern Paper Co., plus assurance of another $25-million in long-term debt from institutional lenders.

The idea of Southern Land, Timber & Pulp Corp. was to put some land into a company, raise money to buy more timberland, and provide pulp to the booming Southeastern paper market. Says Pres. John J. Neely Sr. "We didn't think we could raise money for a mill—it just snowballed." The company now has 150,000 acres of land, of which only 25,000 acres were contributed by the original promoters.

Southern Land shares were sold intrastate by Forestry Service, Inc., a company that Neely controls. Shares were sold partly on an installment basis—with up to 36 months

to pay. Of the $22-million stock sale some $6.6-million is still due the company. Forestry Service, which also has a contract to manage Southern Land for 15% of its profits, took in about $3.6-million in commissions on the sale of securities. The Securities & Exchange Commission now says that some of the shares may have been sold outside the state so the company is registering to clear up any possible taint.

Southern Land at first tried to promote a $45-million tax-exempt bond issue by Early County, Ga., which would have built the mill and leased it to Southern Land. But the issue didn't sell, and Great Northern then entered the picture. GN agreed to put up $15-million in equity, and, in return, received half the project. Maine-based Great Northern now wholly in printing papers, gets product diversification by its move into linerboard, and geographic spread as well.

Sale and leaseback of buildings ups banks' lending power $250-million

Banks around the country are swamping Marine Midland Corp., New York's big 14-bank holding company, with requests for details on a sale-leaseback deal that expanded its lending potential by nearly $250-million, while adding only $10-million in new capital.

Marine Midland sold about $28.8-million of its banking properties to a wholly owned subsidiary set up for that purpose, and then leased them back. It financed the entire transaction through long-term borrowing from a syndicate of 23 lending institutions, including the Ford Foundation. In addition, the lenders have pledged another $8.2-million to finance future sale-leaseback deals.

On its books, the holding company cleared $10-million—the difference between book value and selling price—and counted this as additional capital. The big gain, though, came in freeing from restriction the capital it had invested in real estate: The Federal Reserve doesn't recognize such capital in determining a bank's lending potential. But now the full $30-million received for sale of the real estate is available as a lending base, and applying a yardstick of 8 to 1—loans to capital—Marine Midland figures it has added nearly $250-million to its lending capacity.

The deal is similar to, but a lot more complicated than the sale-leaseback deal of Cleveland's Union Commerce Bank

last year [BW Nov. 11 '61 p. 117]. Marine Midland's officers, in fact, met twice a week for two years working it out, and over 6,500 signatures were needed for the final documents. But indications are it will continue sale-lease-back deals—both on existing properties and on any new unit bank properties it might acquire. All told, Marine Midland may sell another $20-million in properties this way over the next few years.

Filed June 19, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

[Title omitted]

MOTION OF WHITNEY NATIONAL BANK IN JEFFERSON PARISH TO INTERVENE AS A DEFENDANT

Whitney National Bank in Jefferson Parish respectfully moves the Court pursuant to Rule 24 of the Federal Rules of Civil Procedure for leave to intervene as a defendant in this action, in order to assert the defenses in its proposed answer to the plaintiffs' complaint, a copy of which is hereto attached. The grounds for this motion are that:

(1) The relief sought by plaintiffs in this action is a judgment declaring that defendant is prohibited by law from issuing, and an order enjoining him from issuing, "to t. Whitney National Bank, and or the Whitney Holding Corporation and or the Whitney National Bank of Jefferson Parish, a Certificate or Certificates of Authority authorizing them or any of them to establish new branch bank facilities in the name of Whitney National Bank or otherwise in Jefferson Parish, State of Louisiana." Insofar as plaintiffs might seek to prevent defendant from issuing to Applicant for Intervention a Certificate of Authority to commence business as a national banking association, applicant for intervention has a substantial and direct interest in the subject matter of the action.

(2) The representation of the interest of applicant for intervention may be inadequate, and applicant for intervention may be bound by a judgment in this action.

(3) The defenses of the applicant for intervention, as set forth in the attached pleading, and the main action have question of law and fact that are in common.

(4) Intervention by the applicant will not delay or prejudice the adjudication of the rights of the original parties.

Applicant for intervention has noted the pendency of plaintiff's motion for preliminary injunction and will, if granted leave to intervene, file its opposition thereto in due course.

HAMILTON CAROTHERS,
701 Union Trust Building,
Washington 5, D. C.

MALCOLM LOGAN MONROE,
Whitney Building,
New Orleans 12, Louisiana.

June 19, 1962.

Filed June 20, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

[Title omitted]

AFFIDAVIT

James J. Saxon being duly sworn deposes and says:

1. I am Comptroller of the Currency, duly appointed, qualified and acting as said officer.

2. I have access to and control over all of the records of the Office of the Comptroller of the Currency relating to this matter.

3. The purpose of this affidavit is to place before the court a factual account of the events leading up to the formation of Whitney Holding Corporation, Crescent City National Bank and Whitney National Bank of Jefferson Parish. The complaint in this action has set forth these events in a manner which completely distorts and misinterprets the actions taken in connection with the matter by myself and my predecessor in office, the Honorable Ray

M. Gidney. The following is an account of the steps leading up to the formation of the Whitney National Bank of Jefferson Parish (hereafter referred to as Whitney Jefferson) the opening of which plaintiff seeks to enjoin in this action.

In November of 1960, Mr. Keehn W. Berry, President of Whitney National Bank of New Orleans, (hereafter referred to as Whitney New Orleans) visited Mr. W. M. Taylor, then a Deputy Comptroller of the Currency, and engaged in preliminary discussions concerning the competitive situation of Whitney New Orleans in the City of New Orleans and its surrounding suburbs. Mr. Berry pointed out that a great many of his bank's depositors reside in Jefferson Parish and that there was a great demand from the bank's customers for additional facilities in Jefferson Parish. He pointed out that his largest competitor, National Bank of Commerce in New Orleans, was presently operating a bank and three branch banks in Jefferson Parish under the name of National Bank of Commerce in Jefferson Parish. This bank was an affiliate of the National Bank of Commerce in New Orleans and was controlled by the same stockholders with an interlocking Board of Directors and Executive Officers. See Statement of Condition attached. (Exhibit 1) Mr. Berry returned in June of 1961, bringing with him Mr. Malcolm L. Monroe, Director and Attorney for the bank, and extended discussions were held with Mr. Gidney, Mr. Taylor and members of the Comptroller's legal staff. He further pointed out that another competitor was operating on both sides of Jefferson Parish lines by means of separate banks under common ownership and control. He cited the case of one of the plaintiffs in this very action, Merchants Trust and Savings Bank and the American National Bank of Louisiana, both of which banks he alleged were controlled by Mr. Louis Roussel by means of controlling stock interests. See the affidavit of Mr. James J. Gilly dated June 16, 1962, submitted in opposition to this motion.

In view of the fact that their competitors, by means of these affiliate banks, had expanded into Jefferson Parish, the Whitney National wished to explore with the Comptroller whatever legal means were available for a like expansion into this growing area, which needs additional banking facilities. The formation of an affiliate bank was discussed and the formation of a holding company was also

discussed. The bank management felt that a holding company which would own 100% of the stock of both the old bank and the new bank would be preferable to the formation of an affiliate of which the controlling stock would be held by the same persons who control Whitney New Orleans, but which, in view of the wide stock distribution of Whitney New Orleans, would invariably have a minority of stockholders who did not own stock in both banks. The existence of the minority stock interest in each bank, which did not hold corresponding shares in the other, was considered by the Whitney management to be an undesirable situation because it could conceivably hamper the most efficient and effective day-to-day operation of the two banks. Since the same group would be managing both banks, it was thought that situations could arise in which it would be impossible for the interests of two different groups of minority stockholders to be fully protected. For this reason, the Whitney management, as was their right and prerogative elected to use a holding company for the purpose of establishing a new bank in Jefferson Parish.

At all times the applicable Louisiana statutes forbidding the establishment of branch offices across parish lines were fully considered and there was no suggestion that the formation of a holding company would be in any way clandestine or evasive. The stock of Whitney New Orleans was very widely held by a list of over 1,400 stockholders, none of whom owned more than 10% of the outstanding stock. It was evident to everyone concerned that the holding company could not be formed without full and complete approval by the shareholders of Whitney New Orleans and by the Comptroller and the Federal Reserve Board.

4. The Whitney management having decided to submit to its shareholders a proposal to form a holding company and to establish a new bank in Jefferson Parish made the following proposal to the Comptroller: The Whitney management would make application to the Board of Governors of the Federal Reserve System for the approval of the formation of a holding company to be known as Whitney Holding Corporation. Whitney Holding Corporation would become a bank holding company by acquiring substantially all of the voting stock of a proposed new bank, Crescent City National Bank, into which would be consolidated the existing Whitney National Bank of New Orleans, under the charter of Crescent City National Bank, which title would

be changed to Whitney National Bank of New Orleans. By virtue of this procedure, any dissenting stockholders would be fully protected. Under the provisions of 12 U.S.C. 215 (d) any stockholder who dissents to a consolidation has the right to have his shares appraised by disinterested appraisers and to receive the appraised value in cash. It is interesting to note that to date not a single stockholder has asked for appraisal of his shares. Under the terms of the consolidation, shareholders of Whitney National would receive shares of Whitney Holding Corporation in place of their old shares of Whitney National. An application for a new bank to be located in Jefferson Parish and to be called Whitney National Bank of Jefferson Parish would be made to the Comptroller. The stock of this new bank would be entirely owned, with the exception of directors' qualifying shares by Whitney Holding Corporation.

5. The usual full field investigation of the applications was carried out over a period of several months by the Comptroller's examiners. Competitor banks were contacted and their views noted in the investigation reports in accordance with the usual practice.

6. By letters dated October 3, 1961, former Comptroller Gidney gave preliminary approval to the formation of Crescent City National Bank, and the formation of Whitney Jefferson subject to the grant of the approval of the Federal Reserve Board of the formation of the holding company for the purpose of acquiring the new Whitney New Orleans and Whitney Jefferson, as required by the Bank Holding Company Act.

7. Under the provision of Section 3 (b) of the Bank Holding Company Act (12 U.S.C. 1842), the Board was required to solicit the views of the Comptroller on the application of Whitney Holding Corporation to become a bank holding company by acquiring the stock of one or more national banks. If any state bank had been involved, the Board would have been required to similarly solicit the views of the State Banking Commission. If the view of the Comptroller or the State Banking Commissioner is negative, the Board is required by Section 1842 to call a public hearing on the application.

8. Under date of April 11, 1961, Comptroller Gidney advised the Board that he had no objections to the application of Whitney Holding Corporation. Although not required to do so by the statutes, the Federal Reserve Board,

pursuant to its rules (Exhibit 2), caused to be published in the Federal Register under date of November 2, 1961, a notice of hearing on the application of Whitney Holding Corporation for prior approval to become a bank holding company and invited anyone interested in said application to appear and testify at such hearing which was to be held on January 17, 1962. A copy of said notice of hearing is attached hereto and marked Exhibit 3. At the hearing Mr. Keehn W. Berry and Mr. Malcolm Monroe testified for the proponents and Mr. Louis J. Roussel, Clem H. Sehrt, and Victor J. Passera, President of the National Bank of Commerce in Jefferson Parish, testified in opposition. A copy of the transcript is attached hereto and marked Exhibit 4.

On May 3, 1962, the Board of Governors rendered its decision and order approving the application of Whitney Holding Corporation for permission to become a bank holding company by acquiring the stock of Crescent City and Whitney Jefferson. In a fourteen-page opinion, the Board of Governors explored the necessity and desirability of the formation of the holding corporation and of the new bank in Jefferson Parish. The statutory factors of the financial history and condition of the holding company and the banks concerned, their prospects, the character of their management, the convenience needs and welfare of the community and area concerned, and whether or not the effect of the acquisition would be to expand the size and extent of the bank holding system involved beyond limits consistent with adequate and sound banking, the public interest and the preservation of competition in the field of banking, all were considered. Of necessity, the Board also considered the question of whether or not the formation of the holding corporation and its acquisition of Whitney Jefferson would be legal in the state of Louisiana. In this connection, the Board reached the following conclusion:

> "In this aspect, the pending proposal to establish banking facilities in East Bank through the holding company device is due to the natural and legitimate desire of a bank in an expanding metropolitan area to furnish its services more conveniently to customers situated in a section that, although outside the corporate limits of Orleans Parish, is realistically an integral part of the metropolitan economy. The laws of Louisiana do not prohibit expansion of a banking or-

ganization by this means. In the judgment of the Board, this phase of the proposal is a proper expression of the character of the American business system —in some respects, in fact, it is a matter of economic self-defense—and ought not to be frustrated unless it involves effects significantly detrimental to the public interest."

A copy of the Board's decision and the dissenting opinion of Governor Robertson is attached hereto and marked Exhibit 5.

9. Previously, on November 29, 1961, the holders of more than two-thirds of the stock of Whitney New Orleans, had approved the entire transaction including, the formation of the holding company, the formation of the two new banks, Crescent City and Whitney Jefferson, and the consolidation of Crescent City with Whitney New Orleans. All steps in the transaction had previously been clearly spelled out in a letter to stockholders dated October 27, 1961, a copy of which is attached hereto and marked Exhibit 6.

10. On May 18, 1962, the Comptroller issued his approval to the consolidation of Whitney New Orleans with Crescent City under the title of Whitney National Bank of New Orleans. The final steps for the completion of the formation of Whitney Holding Corporation and the Crescent City National Bank and the consolidation were all accomplished on May 24, 1962, and the new bank in New Orleans commenced business on May 25, 1962.

11. After the completion of the above and on the same day, Whitney Holding Corporation completed the organization of Whitney Jefferson by purchasing all of its stock except directors' qualifying shares in exchange for $650,000. The Articles of Association and Certificate of Organization had been previously executed. Bylaws were adopted and the directors and officers elected. A permanent location has been purchased and temporary quarters across the street on 4407 Jefferson Highway have been leased. All that remains to be done to enable Whitney Jefferson to commence business is the issuance of the Comptroller's Certificate of Authorization and the opening of its doors.

12. Before issuing his preliminary approval on October 3, 1961, of the organization of Whitney Jefferson, former Comptroller Gidney, in accordance with his statutory duty, considered the character of the management, the proposed

capital structure, the prospects of the new bank, and the other banking factors which must be considered before authorizing a new banking institution. Because of the fact that a holding company was involved, former Comptroller Gidney conditioned his approval upon the authorization of the Federal Reserve Board to the transaction. This consent and authorization having been rendered on May 3, 1962, the deponent's duty is to issue the Certificate of Authority to Whitney Jefferson since the organizers have faithfully executed all steps and fulfilled all requirements necessary for the organization of a new bank. In order that there may be no question about the propriety of his action, the deponent has made an independent review of the merits of the Whitney Jefferson application. Deponent is fully in accord with the conclusions reached by former Comptroller Gidney that all of the banking factors relating to the application are favorable and that the new bank will serve a useful and constructive purpose in the community.

13. Despite the continued statements of the plaintiffs to the contrary, there is no branch bank involved in these proceedings. There has been no request for a branch of any bank. A new affiliate bank for the Whitney National Bank in New Orleans has been approved. With respect to the allegations in the complaint that the prospective business of the plaintiffs from Jefferson Parish will be damaged by the new bank, this must be answered by the observation that the presence in Jefferson Parish of two New Orleans banks, through their affiliates, plaintiff Merchants Bank and Trust Company and the National Bank of Commerce in Jefferson Parish, already has caused such damage, if any to be incurred. To deprive Whitney New Orleans of the right to have an affiliate in Jefferson Parish, would be, in my opinion, to unfairly discriminate against Whitney New Orleans.

14. The plaintiff Guaranty Bank and Trust Company operates five parishes away and will not be in any affected by banking operations in the metropolitan area of New Orleans, including Jefferson Parish.

15. Plaintiffs, in their complaint, have endeavored to create an impression that the former Comptroller and the present Comptroller somehow have engaged in a sinister conspiracy with the Whitney management to evade the law. The entire record in this matter shows that all applications were processed in the normal manner and according to the same rules and policies as many similar applications being

processed during the same period. The charge that the branch banking laws are being evaded is completely without foundation as is conclusively demonstrated by the points and authorities submitted on behalf of the defendant.

/Signed/ JAMES J. SAXON.

Subscribed and sworn to before me, this 20th day of June, 1962.

Signed/ HELEN CRIST CRAVER.

My Commission Expires Sept. 30, 1966. Seal of Notary.

Filed June 20, 1962

DEFENDANT SAXON EXHIBIT 1

THE NATIONAL BANK OF COMMERCE

In New Orleans



STATEMENT OF CONDITION

DECEMBER 31, 1961



STATEMENT OF CONDITION

DECEMBER 31, 1961

(Taken from Docket file)

Ex 1

49

COMMERCIAL ACCOUNTS

•

PERSONAL ACCOUNTS

•

COMMERCIAL LOANS

•

AUTOMOBILE LOANS

•

REAL ESTATE MORTGAGE LOANS

•

PERSONAL LOANS

•

HOME IMPROVEMENT LOANS

•

ACCOUNTS RECEIVABLE LOANS

•

SAVINGS DEPARTMENT

•

TRUST DEPARTMENT

•

FOREIGN DEPARTMENT

•

TRAVELERS CHEQUES

•

GUARANTEED CHECKS

•

SAFE DEPOSIT VAULTS

•

INVESTMENT SERVICE DEPARTMENT

DIRECTORS AND MEMBERS OF THE ADVISORY BOARD

EARL G. BATEMAN*
Owner, Bateman Drilling Co.

CLAY W. BECKNER
President, Jos. Ruthborne Land & Lumber Co., Inc.

BRUCE K. BROWN
Business Consultant

WILLIAM J. CHILDRESS*
President, Apex Sales Company

LOUIS H. CLAY
Chairman, Southern Ford Tractor Corporation

CHARLES I. DENECHAUD, JR.*
Attorney-at-Law

HARRY M. ENGLAND*
President, Gulf Bottlers, Inc.

PARRISH FULLER
Forest Products

HERMANN GELPI
Vivian J. Gelpi Co.

EDWIN A. GEOGHEGAN
Executive Vice President
Hunt Foods and Industries, Inc.

IRA B. HARKEY

FRANK B. HAYNE*
President, Nola Oil Co., and Nola Ice Co., Inc.

A. J. HIGGINS, JR.*

MAYER ISRAEL
President, Israel Realty Co., Inc.

PAUL F. JAHNCKE, JR.
President, Jahncke Service, Inc.

ARTHUR L. JUNG, JR.

WALLACE C. KEMPER
President, Southdown, Inc.

VICTOR J. KURZWEG, JR.
President, Consolidated Companies, Inc.

ALBERT V. LABICHE*
President, Labiche's, Inc.

L. J. LAUTENSCHLAEGER*
Attorney-at-Law

PAUL MALONEY, JR.
President, Maloney Trucking & Storage, Inc.

EUGENE M. McCARROLL
Executive Vice President

RENE MERIC*
Broker

JOHN OULLIBER
President

A. Q. PETERSEN

GEORGE PLANT
President, Plant Shipping Co., Inc.

AZZO J. PLOUGH*
Attorney-at-Law

SHELLEY SCHUSTER
Chairman of the Board
Transoceanic Shipping Company

PERCY H. SITGES
Chairman of the Executive Committee

JEAN MASON SMITH
Ferrier, Mason Smith & Company

JAMES M. TODD
Consulting Engineer

HARRY S. VERLANDER*

RICHARD L. VOELKER, JR.
Attorney-at-Law

ROBERT M. WALMSLEY, III
President, Continental Barges, Inc.

L. KEMPER WILLIAMS
Williams, Inc.

WM. AUGUST WORNER*
Harrison Drug Center

*Members of the Advisory Board

(See Officers)

EX 1

THE NATIONAL BANK OF COMMERCE
IN NEW ORLEANS

CONDENSED STATEMENT OF CONDITION AS OF DECEMBER 31, 1961

RESOURCES

Cash on Hand and Due from Banks	$ 58,565,452.33
U. S. Government Securities	58,922,005.57
Obligations of U. S. Government Instrumentalities	1,003,658.30
Stock in Federal Reserve Bank	570,000.00
Municipal Bonds	15,537,514.75
Other Bonds	1,842.65
Loans and Discounts	124,453,479.60
Special Call Loans	2,750,000.00
Customers' Liability on Acceptances	68,356.85
Branch Bank Buildings and Leasehold Improvements	861,393.20
Furniture and Fixtures	664,349.56
Stock, Gravier Improvement Co., Inc.	500,000.00
Stock, Tulane Branch Corporation	300,000.00
Accrued Interest on Bonds and Loans, and Other Assets	1,392,065.34
	$265,590,118.15

LIABILITIES

Demand Deposits	$178,844,857.69	
Savings Deposits	38,268,852.51	
Other Time Deposits	25,548,820.87	
Total Deposits		$242,662,531.07
Liability on Acceptances	189,061.42	
Less: in Portfolio	104,941.41	84,120.01
Dividend Payable Jan. 2, 1962		264,000.00
Discount collected but not earned		692,667.92
Reserve for Taxes, Interest and Expenses		1,635,458.41
TOTAL LIABILITIES		$245,338,177.41
Capital Stock *(660,000 Shares, $10 Par)*	$6,600,000.00	
Surplus	12,400,000.00	
Undivided Profits	1,251,940.74	
Total Capital Funds		$ 20,251,940.74
		$265,590,118.15

Contingent Liability on Letters of Credit Issued but not drawn against $1,766,879.19

MEMBER FEDERAL DEPOSIT INSURANCE CORPORATION

OFFICERS

JOHN OULLIBER
President

PERCY H. SITGES
Chairman of the Executive Committee

EUGENE M. McCARROLL
Executive Vice President

CLEBERT C. SMITH
Executive Vice President
Correspondent Banking

Senior Vice Presidents

THOS. F. REGAN
FRANCIS C. DOYLE

JOHN E. WAX
Vice President and Comptroller

J. WENSLES PARRA
Vice President and Cashier

Vice Presidents

EDWARD J. DOBARD
W. J. DREZ
JOS. P. DUFOUR
IRWIN GLASER
V. GORDON ISAACSON
JOSEPH J. KNECHT
GEORGE J. LARMANN
RENE J. LAZARE
JOSEPH G. LIER
R. CHARLES STRAIN

JOSEPH C. WHITE
Vice President and Secretary to the Board

Assistant Vice Presidents

FRANK J. BASILE
J. KENNETH BUTLER
DANIEL B. LE GARDEUR

Assistant Cashiers

C. F. ANDRESSEN
BRUCE A. BARKER
PHILIP J. BECKER
EMMET M. BLUM
E. F. DEFOURNEAUX
T. C. DOWLING
MILTON F. FOGARTY
HAROLD S. FORD
CHARLES E. KEENER
B. J. LEGETT
THOS. A. MASILLA
J. S. MIDDLETON
M. C. RYAN
C. W. SANDERS
SAM C. TOURNILLON
HARRY E. WOODS
MELVIN J. ZIEGLER

Advertising and Public Relations

ROBERT D. HESS, *Assistant Vice President*

AUDITING DEPARTMENT

PAUL MUEHLEMANN, *Manager*

FOREIGN DEPARTMENT

E. G. JANÉ, *Vice President*
LAWRENCE J. LAURIE, *Assistant Cashier*

PERSONAL LOAN DEPARTMENT

M. J. ROUSSEAU, JR., *Vice President*
F. PINOGES, *Assistant Vice President*
A. F. FINNEGAN, *Assistant Cashier*

SAFE DEPOSIT DEPARTMENT

HENRY A. DESDIER, *Manager*

SAVINGS DEPARTMENT

MRS. DOROTHY A. PUNEKY, *Manager*

TRUST DEPARTMENT

R. J. EMMER, *Trust Officer*
JOHN E. MORGAN, *Trust Officer*
KENNETH J. LE BLANC, *Assistant Trust Officer*

HEAD OFFICE

BARONNE AND COMMON STREETS
Customers' Parking Garage
Commerce Building — 819 Gravier St.

BRANCHES

CANAL STREET BRANCH
1501 CANAL STREET
W. W. ROOKER JR., *Assistant Vice President*
W. V. GRAFF, *Assistant Cashier*

CARROLLTON BRANCH
3201 S. CARROLLTON AVENUE
FRANK A. BROWN, *Vice President*
N. F. BELLONI, *Assistant Cashier*

DRYADES MARKET BRANCH
1529 DRYADES STREET
V. A. DONAHUE, *Assistant Cashier*

FRENCH MARKET BRANCH
941 DECATUR STREET
D. R. HANEMANN, *Assistant Cashier*

GEN. MEYER BRANCH
4800 GEN. MEYER AVENUE
EUGENE J. CASTILLE, JR., *Manager*

GENTILLY WOODS BRANCH
4525 CHEF MENTEUR HIGHWAY
GEORGE J. RUHLMAN, JR., *Assistant Cashier*

MAGAZINE STREET BRANCH
3200 MAGAZINE STREET
J. HARRISON HUGHES, *Assistant Cashier*

ST. CHARLES - JACKSON BRANCH
2201 ST. CHARLES AVENUE
WARREN SULLIVAN, *Manager*

TULANE AVENUE BRANCH
3306 TULANE AVENUE
EDWARD B. WEAKS, *Assistant Cashier*

OIL AND GAS DEPARTMENT
HOWARD F. ALBERTY, *Staff Geologist*

LATIN AMERICAN REPRESENTATIVE
WILLIAM A. VON HUMBOLDT
AV. JUAREZ 42
EDIFICIO C. DESP. 1004
MEXICO 1, D. F., MEXICO

AFFILIATE BANK
THE NATIONAL BANK OF COMMERCE
IN JEFFERSON PARISH

OFFICERS

VIC J. PASSERA — *President*
F. M. LEGUENEC, JR. — *Vice President and Cashier*
LOUIS H. CLAY — *Vice President*
HOWARD S. COX — *Vice President*
JOSEPH S. DELANEY — *Vice President, Mgr. Metairie Office*
VICTOR J. KURZWEG, JR. — *Vice President*
SHELLEY SCHUSTER — *Vice President*
CLEBERT C. SMITH — *Vice President*
FRANK A. GRECO — *Vice President, Mgr. Harahan Office*
NUMA J. BARROIS — *Assistant Vice President*
EDWARD SMIRA — *Assistant Cashier & Manager Veterans Highway Office*
DAVID J. VOGLER — *Assistant Cashier*
DANIEL B. RYAN — *Assistant Cashier & Manager Consumer Credit Dept.*
CLEVELAND GONZALES — *Manager Discount Dept.*

ADVISORY COMMITTEE

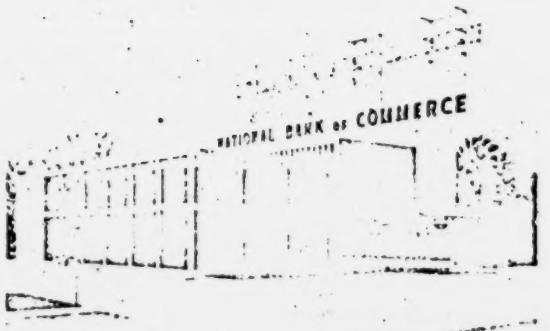
HAROLD BUCHLER — *Attorney*
SIDNEY W. CAMPBELL — *President, S. W. Campbell & Son, Inc.*
SAM CARO — *President, Southern Tailoring Co., Inc.*
JOSEPH LUCAS — *President, Medical Arts Pharmacy, Inc.*
THURSTON B. MARTIN — *President, First National Life Ins. Co.*
GEORGE J. PECORARO — *Business Consultant*
HAROLD E. WISE — *President, Harold's Cafeteria*

McDONALD, BUCHLER & CARR, *Attorneys*

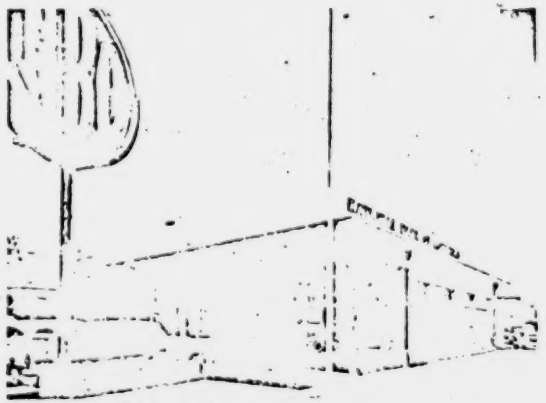
SERVICES

COMMERCIAL ACCOUNTS
PERSONAL ACCOUNTS
SAVINGS DEPARTMENT
COMMERCIAL LOANS
PERSONAL LOANS
AUTOMOBILE LOANS
REAL ESTATE MORTGAGE LOANS
HOME IMPROVEMENT LOANS
TRAVELERS CHEQUES
GUARANTEED CHECKS
SAFE DEPOSIT VAULTS
CHRISTMAS CLUB

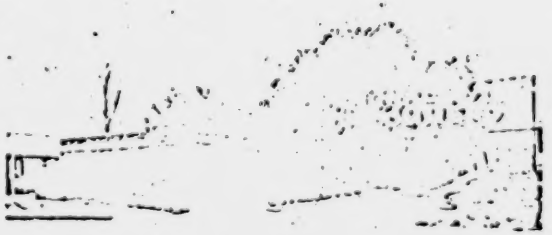
Head Office—2400 Jefferson Highway
Metairie Office—2030 Metairie Road
Harahan Office—6318 Jefferson Hwy.
Veterans Hwy. Office—3300 Veterans Hwy.



HEAD OFFICE
Jefferson Highway at Laborre Road



METAIRIE OFFICE
2030 Metairie Road



HARAHAN OFFICE
Jefferson Highway at Oak Avenue

THE NATIONAL BANK OF COMMERCE

IN JEFFERSON PARISH

NBC IN JEFFERSON PARISH

STATEMENT OF CONDITION

DECEMBER 29, 1961

THE NATIONAL BANK OF COMMERCE

IN JEFFERSON PARISH (LOUISIANA)

DIRECTORS

WILLIAM E. CASSIDY
Asst. Div. Sales Manager Texaco, Inc.

LOUIS H. CLAY *Board Chairman, Southern Ford Tractor Corporation*

HOWARD S. COX *Vice President*

S. J. GONZALES, JR. *President, Southern School Equipment Co., Inc.*

WILLIAM T. HESS
Vice-President & Chief Engineer, Louisiana Power & Light Co.

DR. VIRGIL T. JACKSON, JR. *Dentist*

ARTHUR L. JUNG, JR. *President, Jung Realty Co., Inc.*

VICTOR J. KURZWEG, JR. *President, Consolidated Companies, Inc.*

F. M. LEGUENEC, JR.
Vice President and Cashier

C. C. McKIRAHAN *Retired*

JOHN A. MILLER *President, Brown-Miller Company*

R. [redacted] ITCHELL *President, Louisiana Transit Co., Inc.*

ROBERT M. MONSTED *Board Chairman, Jefferson Cold Storage, Inc.*

DR. ALTON OCHSNER
Physician and Surgeon

JOHN OULLIBER *President, The National Bank of Commerce in New Orleans*

HENRY F. OWSLEY, JR. *Owner, Owsley Insurance Agency*

VIC J. PASSERA *President*

SHELLY SCHUSTER *Board Chairman, Transoceanic Shipping Co.*

CLEBERT C. SMITH
Executive Vice President The National Bank of Commerce in New Orleans

ROSS WILLS *Vice President C. W. Vollmer & Co., Inc.*

STATEMENT OF CONDITION

DECEMBER 29, 1961

RESOURCES

Cash on Hand and Due from Banks	$ 3,171,975.70
U. S. Government Securities	8,517,525.01
Municipal Securities	2,018,474.02
Stock in Federal Reserve Bank	36,000.00
Obligations of U. S. Government Instrumentalities	685,301.50
Loans and Discounts	6,020,070.67
Bank Buildings and Leasehold Improvements	431,483.94
Furniture and Fixtures	177,480.54
Accrued Interest, Prepaid Expenses, and Other Assets	152,545.27
TOTAL RESOURCES	$21,210,856.65

LIABILITIES

Deposits		$19,340,384.70
Discount Collected but not Earned		61,932.78
Reserve for Taxes, Interest and Expenses		427,176.69
TOTAL LIABILITIES		$19,829,494.17
Capital Stock *(60,000 Shares, $10.00 Par)*	$600,000.00	
Surplus	600,000.00	
Undivided Profits	181,362.48	
Total Capital Funds		$ 1,381,362.48
TOTAL		$21,210,856.65

Member Federal Deposit Insurance Corporation

This Bank is a Legal Affiliate of
The National Bank of Commerce in New Orleans

Filed June 20, 1962

EXHIBIT 2

(b) When a lot of livestock, to be moved under this part, for immediate slaughter, to a federally inspected slaughtering establishment or a slaughtering establishment specifically approved in § 78.15(b) of this chapter, has been inspected and found free of any evidence of screwworms and treated at an inspection station or other place in accordance with § 83.6(b), § 83.7(a)(2), § 83.8(c)(2). § 83.8a (a) or (c), or § 83.12(a), the inspector may issue a certificate, in quadruplicate, reciting that the lot has been so inspected and found free of any evidence of screwworms and treated, identifying the lot by number of livestock, kind, breed, and sex, and giving the data of inspection and treatment, the names and addresses of the consignor and consignee, and the point of origin and destination of the shipment.

(Secs. 4, 5, 23 Stat. 32, as amended, secs. 1, 2, 32 Stat. 791, as amended, 792, as amended; 21 U.S.C. 111–113, 120, 121. Interpret or apply secs. 6, 7, 23 Stat. 32, as amended; 21 U.S.C. 115, 117, 19 F.R. 74, as amended)

The foregoing amendments impose additional requirements upon the interstate movement of livestock and certain dogs from or through Alabama or Georgia into Florida. There are currently existing in Alabama and Georgia screwworm infestations which may be disseminated into Florida, an area currently free of screwworms, if additional preventive measures are not taken regarding the interstate movement of livestock into Florida. The amendments should be made effective promptly in order to accomplish their purpose in the public interest. Therefore, under section 4 of the Administrative Procedure Act (5 U.S.C. 1003), it is found upon good cause that notice and other public procedure with respect to such amendments are impracticable, unnecessary, and contrary to the public interest, and good cause if found for making them effective less than 30 days after their publication in the FEDERAL REGISTER.

Effective date. The foregoing amendments shall become effective upon issuance.

Done at Washington, D.C., this 31st day of October 1961.

M. R. CLARKSON,
Acting Administrator,
Agricultural Research Service.

[F.R. Doc. 61-10563; Filed, Nov. 2, 1961; 8:53 a.m.]

Title 12—BANKS AND BANKING

§ 262.4 Action on applications or requests, and similar matters.

* * * * *

(g) *Bank holding company and merger applications.* In addition to procedures applicable under other provisions of this part, the following procedures are applicable in connection with the Board's consideration of applications under section 3 of the Bank Holding Company Act of 1956 (12 U.S.C. 1842), hereafter called holding company applications, and of applications under section 18(c) of the Federal Deposit Insurance Act (12 U.S.C. 1828), hereafter called merger applications. Unless otherwise indicated, these procedures apply to both types of applications.

(1) The Board issues each week a list that identifies holding company and merger applications received during the preceding week. Notice of receipt of each holding company application is published in the FEDERAL REGISTER as provided in § 222.4(e)(2) of this chapter [Regulation Y].

(2) If a hearing is required by law or if the Board determines that a hearing for the purpose of taking evidence is desirable, the Board will issue an order for such a hearing, and notice thereof will be published in the FEDERAL REGISTER. Any such hearing will be conducted by a hearing examiner or hearing officer in accordance with the Board's Rules of Practice for Formal Hearings (Part 263 of this chapter) and, unless otherwise ordered by the Board, shall be public.

(3) In any case in which a formal hearing is not ordered by the Board, the Board may afford the applicant and other properly interested persons (including Governmental agencies) an opportunity to present views orally before the Board or its designated representative. Unless otherwise ordered by the Board, any such oral presentation of views shall be public and notice of such public proceeding will be published in the FEDERAL REGISTER. Participants in any oral presentation of views will be allotted reasonable periods of time for presentation of their views.

(4) The Board's action on each application is embodied in an Order that indicates the voting of members of the Board and is accompanied by a Statement of the reasons for the Board's action. Both the Order and accompanying Statement are released to the press. Normally, the Statement is issued at the time of issuance of the Order; where this is not practicable, the Statement is issued as promptly as possible after issuance of the Order. Each such Order is published in the [illegible] and the Order approval, a requirement that the transaction approved shall be consummated within three months and, in the case of acquisition by a holding company of stock of a newly organized bank, a requirement that such bank shall be opened for business within six months.

(6) After action by the Board on an application, the Board will not grant any request for reconsideration of its action, unless the request presents relevant facts that, for good cause shown, were not previously presented to the Board, or unless it otherwise appears to the Board that reconsideration would be appropriate.

2a. The purpose of this amendment is to inform the public of procedures followed by the Board of Governors of the Federal Reserve System with respect to applications under section 3 of the Bank Holding Company Act of 1956 (12 U.S.C. 1842) and of applications under section 18(c) of the Federal Deposit Insurance Act (12 U.S.C. 1828).

b. Notice, public participation, and deferred effective date are not required by section 4 of the Administrative Procedure Act for rules of agency procedure or practice, and therefore were not provided in connection with the adoption of these amendments.

(Sec. 11(i), 38 Stat. 262; 12 U.S.C. 248(i))

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
[SEAL] MERRITT SHERMAN,
Secretary.

[F.R. Doc. 61-10538; Filed, Nov. 2, 1961; 8:53 a.m.]

Title 14—AERONAUTICS AND SPACE

Chapter III—Federal Aviation Agency

SUBCHAPTER C—AIRCRAFT REGULATIONS

[Reg. Docket No. 950; Amdt. 362]

PART 507—AIRWORTHINESS DIRECTIVES

Canadair CL-44D4 Aircraft

There have been failures of the elevator tab tension rods on Canadair CL-44D4 aircraft. To preclude further failures, an airworthiness directive requiring replacement of the elevator tab tension rods every 450 hours' time in service is considered necessary.

As a situation exists which demands immediate action in the interest of safety, it is found that notice and public [illegible]

§ 83.12(a), the inspector may issue a certificate, in quadruplicate, reciting that the lot has been so inspected and found free of any evidence of screwworms and treated, identifying the lot by number of livestock, kind, breed, and sex, and giving the data of inspection and treatment, the names and addresses of the consignor and consignee, and the point of origin and destination of the shipment.

(Secs. 4, 5, 23 Stat. 32, as amended, secs. 1, 2, 32 Stat. 791, as amended, 792, as amended; 21 U.S.C. 111–113, 120, 121. Interpret or apply secs. 6, 7, 23 Stat. 32, as amended; 21 U.S.C. 115, 117, 19 F.R. 74, as amended)

The foregoing amendments impose additional requirements upon the interstate movement of livestock and certain dogs from or through Alabama or Georgia into Florida. There are currently existing in Alabama and Georgia screwworm infestations which may be disseminated into Florida, an area currently free of screwworms, if additional preventive measures are not taken regarding the interstate movement of livestock into Florida. The amendments should be made effective promptly in order to accomplish their purpose in the public interest. Therefore, under section 4 of the Administrative Procedure Act (5 U.S.C. 1003), it is found upon good cause that notice and other public procedure with respect to such amendments are impracticable, unnecessary, and contrary to the public interest, and good cause if found for making them effective less than 30 days after their publication in the FEDERAL REGISTER.

Effective date. The foregoing amendments shall become effective upon issuance.

Done at Washington, D.C., this 31st day of October 1961.

M. R. CLARKSON,
Acting Administrator,
Agricultural Research Service.

[F.R. Doc. 61-10563; Filed, Nov. 2, 1961; 8:53 a.m.]

Title 12—BANKS AND BANKING

Chapter II—Federal Reserve System

SUBCHAPTER A—BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

PART 262—RULES OF PROCEDURE

Actions on Applications or Requests, and Similar Matters; Bank Holding Company and Merger Applications

1. Effective November 1, 1961, Part 262 is amended by adding the following new paragraph (g) to § 262.4:

of 1956 (12 U.S.C. 1842), hereafter called holding company applications, and of applications under section 18(c) of the Federal Deposit Insurance Act (12 U.S.C. 1828), hereafter called merger applications. Unless otherwise indicated, these procedures apply to both types of applications.

(1) The Board issues each week a list that identifies holding company and merger applications received during the preceding week. Notice of receipt of each holding company application is published in the FEDERAL REGISTER as provided in § 222.4(e)(2) of this chapter [Regulation Y].

(2) If a hearing is required by law or if the Board determines that a hearing for the purpose of taking evidence is desirable, the Board will issue an order for such a hearing, and notice thereof will be published in the FEDERAL REGISTER. Any such hearing will be conducted by a hearing examiner or hearing officer in accordance with the Board's Rules of Practice for Formal Hearings (Part 263 of this chapter) and, unless otherwise ordered by the Board, shall be public.

(3) In any case in which a formal hearing is not ordered by the Board, the Board may afford the applicant and other properly interested persons (including Governmental agencies) an opportunity to present views orally before the Board or its designated representative. Unless otherwise ordered by the Board, any such oral presentation of views shall be public and notice of such public proceeding will be published in the FEDERAL REGISTER. Participants in any oral presentation of views will be allotted reasonable periods of time for presentation of their views.

(4) The Board's action on each application is embodied in an Order that indicates the voting of members of the Board and is accompanied by a Statement of the reasons for the Board's action. Both the Order and accompanying Statement are released to the press. Normally, the Statement is issued at the time of issuance of the Order; where this is not practicable, the Statement is issued as promptly as possible after issuance of the Order. Each such Order is published in the FEDERAL REGISTER; and the Order and Statement are published in the next succeeding issue of the Federal Reserve Bulletin.

(5) Each Order of the Board approving an application includes, as a condition of such approval, a requirement that the transaction approved shall not be consummated within seven calendar days following the date of such Order, except in emergency or other situations as to which the Board determines that such a requirement would not be in the public interest. Each Order approving an application also includes, as a condition of

that, for good cause shown, were not previously presented to the Board, or unless it otherwise appears to the Board that reconsideration would be appropriate.

2a. The purpose of this amendment is to inform the public of procedures followed by the Board of Governors of the Federal Reserve System with respect to applications under section 3 of the Bank Holding Company Act of 1956 (12 U.S.C. 1842) and of applications under section 18(c) of the Federal Deposit Insurance Act (12 U.S.C. 1828).

b. Notice, public participation, and deferred effective date are not required by section 4 of the Administrative Procedure Act for rules of agency procedure or practice, and therefore were not provided in connection with the adoption of these amendments.

(Sec. 11(1), 38 Stat. 262; 12 U.S.C. 248(1))

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
[SEAL] MERRITT SHERMAN,
Secretary.

[F.R. Doc. 61-10538; Filed, Nov. 2, 1961; 8:53 a.m.]

Title 14—AERONAUTICS AND SPACE

Chapter III—Federal Aviation Agency

SUBCHAPTER C—AIRCRAFT REGULATIONS

[Reg. Docket No. 950; Amdt. 382]

PART 507—AIRWORTHINESS DIRECTIVES

Canadair CL-44D4 Aircraft

There have been failures of the elevator tab tension rods on Canadair CL-44D4 aircraft. To preclude further failures, an airworthiness directive requiring replacement of the elevator tab tension rods every 450 hours' time in service is considered necessary.

As a situation exists which demands immediate action in the interest of safety, it is found that notice and public procedure hereon are impracticable and good cause exists for making this amendment effective upon publication in the FEDERAL REGISTER.

In consideration of the foregoing and pursuant to the authority delegated to me by the Administrator (25 F.R. 6489), § 507.10(a) of Part 507 (14 CFR Part 507) is hereby amended by adding the following new airworthiness directive:

CANADAIR. Applies to all CL-44D4 aircraft. Compliance required as indicated.

To preclude failure of the elevator tab tension rods, P/N 28-90031, the life of each rod is limited to 450 hours' time in service.

Filed June 20, 1962

EXHIBIT 3

WHITNEY HOLDING CORP.

Order for Public Proceeding

In the matter of the application of Whitney Holding Corporation, New Orleans, Louisiana, pursuant to section 3(a)(1) of the Bank Holding Company Act of 1956.

Whitney Holding Corporation, New Orleans, Louisiana, has filed an application, pursuant to section 3(a)(1) of the Bank Holding Company Act of 1956, for prior approval by the Board of Governors of action whereby Whitney Holding Corporation would become a bank holding company by acquiring substantially all of the stock of (1) the Crescent City National Bank, New Orleans, Louisiana (a proposed new bank), into which would be consolidated the existing Whitney National Bank of New Orleans, under the latter title, and (2) the Whitney National Bank in Jefferson Parish, Louisiana (a proposed new bank). Notice of this application was published in the FEDERAL REGISTER affording interested persons an opportunity to submit written views and comments (26 F.R. 6792).

It now appears to the Board to be in the interest of the public, as well as the Applicant, to afford further opportunity for the expression of views and opinions by interested persons in a public proceeding before the Board.

Accordingly, *it is hereby ordered*, That a public proceeding before the Board be held commencing at 10 a.m. on January 17, 1962, at the offices of the Board of Governors, Washington, D.C.

It is further ordered, That any person desiring to appear before the Board at this proceeding should file with the Secretary of the Board, 20th and Constitution Avenue NW., Washington 25, D.C., on or before January 3, 1962, a written request setting forth a brief statement of the nature of the views he wishes to express. Persons submitting such requests will be notified of the Board's decision thereon.

Dated at Washington, D.C., this 19th day of December 1961.

By order of the Board of Governors.

[SEAL] MERRITT SHERMAN,
Secretary.

[F.R. Doc. 61-12172; Filed, Dec. 22, 1961; 8:46 a.m.]

WHITNEY HOLDING CORP.

Order for Public Proceeding

In the matter of the application of Whitney Holding Corporation, New Orleans, Louisiana, pursuant to section 3(a)(1) of the Bank Holding Company Act of 1956.

Whitney Holding Corporation, New Orleans, Louisiana, has filed an application, pursuant to section 3(a)(1) of the Bank Holding Company Act of 1956, for prior approval by the Board of Governors of action whereby Whitney Holding Corporation would become a bank holding company by acquiring substantially all of the stock of (1) the Crescent City National Bank, New Orleans, Louisiana (a proposed new bank), into which would be consolidated the existing Whitney National Bank of New Orleans, under the latter title, and (2) the Whitney National Bank in Jefferson Parish, Louisiana (a proposed new bank). Notice of this application was published in the FEDERAL REGISTER affording interested persons an opportunity to submit written views and comments (26 F.R. 6792).

It now appears to the Board to be in the interest of the public, as well as the Applicant, to afford further opportunity for the expression of views and opinions by interested persons in a public proceeding before the Board.

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Dated at Washington, D.C., this 19th day of December 1961.

By order of the Board of Governors.

[SEAL] MERRITT SHERMAN,
Secretary.

[F.R. Doc. 61-12172; Filed, Dec. 22, 1961; 8:46 a.m.]

Federal Register
Dec. 22, 1961

Exhibit 4

TRANSCRIPT OF PROCEEDINGS

UNITED STATES OF AMERICA

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

In the Matter of the Application of: WHITNEY HOLDING CORPORATION New Orleans, Louisiana

Pursuant to Section 3 (a) (1) of the Bank Holding Company Act of 1956

Washington, D. C.

January 17, 1962

TABLE OF CONTENTS

Statement of: Page

Keehn W. Berry, President, Whitney Holding Corporation 63

Louis J. Roussel, American State Gulf Natural Gas Corporation and Universal Drilling Company, Inc., New Orleans, Louisiana 75

Clem H. Sehrt, Sehrt & Boyle, New Orleans, Louisiana 83

Victor J. Passera, Jr., President, The National Bank of Commerce in Jefferson Parish, Louisiana 90

Malcolm L. Monroe, Monroe & Lemann, New Orleans, Louisiana 92

[1] UNITED STATES OF AMERICA

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

In the Matter of: The Application of WHITNEY HOLDING CORPORATION, New Orleans, Louisiana, pursuant to Section 3 (a) (1) of the Bank Holding Company Act of 1956 for the Board's approval of the formation of a Bank Holding Company

Room 1202
Federal Reserve Building
Constitution Avenue
Washington, D. C.

Wednesday, January 17, 1962.

The above-entitled matter came on for hearing, pursuant to notice, at 10:00 o'clock a.m.

MEMBERS OF THE BOARD PRESENT:

Chairman William McC. Martin, Jr., Presiding; Governor C. Canby Balderston; Governor A. L. Mills, Jr.; Governor J. L. Robertson; Governor Charles N. Shepardson; Governor G. H. King, Jr.; Governor George W. Mitchell.

APPEARANCES:

Malcolm L. Monroe, Esq., Monroe & Lemann, 1424 Whitney Building, New Orleans, Louisiana, and Keehn W. Berry, President, on behalf of Whitney Holding Corporation.

[2] Clem H. Sehrt, Esq., Sehrt & Boyle, 1907 Pere Marquette Building, New Orleans, Louisiana, on behalf of opposition: L. J. Roussel, Universal Drilling Corporation, Gulf Natural Gas Company, and estate of Mrs. John Segier.

Louis J. Roussel, 502 Whitney Building, New Orleans, Louisiana, on behalf of Self; American State Gulf Natural Gas Corporation and Universal Drilling Company, Inc.

Victor J. Passera, Jr., President, The National Bank of Commerce in Jefferson Parish, Louisiana.

[3] PROCEEDINGS

Chairman Martin: All right, gentleman, I will call the meeting to order.

The Board is meeting this morning to receive oral presentations of views and comments with respect to the application by the Whitney Holding Corporation, New Orleans, Louisiana, for the Board's prior approval of the formation of a holding company, pursuant to Section 3 (a) (1) of the Bank Holding Company Act.

The applicant seeks approval of its acquisition of the stock of the Crescent City National Bank, New Orleans, Louisiana, a proposed new bank, into which would be consolidated the existing Whitney National Bank of New Orleans under the latter title, and the Whitney National Bank in Jefferson Parish, Louisiana, a proposed new bank.

I am going to ask counsel for the Board to state for the record the appearances to be made and the general procedure that we will follow.

Mr. O'Connell: Mr. Chairman, pursuant to publication in the Federal Register of notice of this public proceeding and for opportunity for the presentation to the Board of Governors of views and comments, the following appearances for the purpose of presenting such views are noted:

On behalf of the applicant, Mr. Keehn W. Berry, President, Whitney National Bank of New Orleans, and [4] Mr. Malcolm L. Monroe, counsel for the applicant.

Mr. Chairman, the applicant has been given one hour for its presentation and has been advised that this time may be used in any manner desired in relation to its presentation in chief, summary, or rebuttal presentation.

I will ask each person appearing this morning that if a written statement of his remarks is available, that it be presented to the court reporter to be placed in the record, and then to the extent possible that a summary of that statement be presented to the Board.

The Board is also granted the opportunity for oral presentation to Mr. Louis J. Roussel and to his counsel, Mr. Clem H. Sehrt, both gentlemen from New Orleans, Louisiana. These gentlemen have also been advised together they have 30 minutes for their presentations.

In addition, Mr. Chairman, I am advised this morning there is present at the oral presentation a Mr. Vic J. Passera, Jr., President of the National Bank of Commerce

in Jefferson Parish, Louisiana. Mr. Passera did not, pursuant to the Board's published notice, request in advance nor was he given permission to appear and give a statement, Mr. Chairman. However, he now requests he be allowed to appear before the Board and present a few remarks in reference to the application.

If appropriate, I would like the Chairman's views on this request.

[5] Chairman Martin: Well, the Chair will ask the applicant whether he has any objection to Mr. Passera.

Mr. Berry: None.

Chairman Martin: Well, if the applicant has no objection, we will give Mr. Passera not more than 10 minutes if that is agreeable with Mr. Passera.

Mr. Passera: Yes, thank you.

Mr. O'Connell: Thank you, Mr. Chairman.

I am directed by the Board to advise that within 15 days following today's proceedings, that is on or about February 1, 1962, the Board will receive from participants any written comments or views they wish to submit relating to today's presentations.

A transcript of the proceedings is being made and copies will be available for purchase. Orders for such copies may be placed with the reporter at the close of today's presentations.

Mr. Chairman, that concludes the Board's counsel's statement.

Chairman Martin: The Board will now proceed with the applicant and anyone the applicant sees fit to testify.

ORAL ARGUMENT OF KEEHN W. BERRY, PRESIDENT, WHITNEY HOLDING CORPORATION

Mr. Berry: I feel apologetic in taking the time of this Board.

Chairman Martin: There is no reason to stand up if you would rather sit down.

[6] Mr. Berry: I will sit in just a moment, then, if I may.

I first wanted to give you some maps here that would enable you to follow the thing, see the physical layout.

In New Orleans, we are further inclined to judge directions by the compass, in relationship to the river and the lake, so that in our application we refer to "East Jefferson," "East Jefferson west of New Orleans."

The heavy blue line on these maps shows the Parish line and the application relates to this unit here (indicating map) in green, the green star. This unit here (indicating on map). And it is "East Jefferson" only because it is on the east bank of the Mississippi River.

Now, there is a portion of Jefferson Parish located on the other bank of that river. But at this particular time, we are asking for the right to serve East Jefferson.

In order to conserve your time, I shall stick very closely to some written comments which I have prepared.

The City of New Orleans as a metropolitan area has spread in recent years beyond the boundaries of the Parish of Orleans.

The "parish" in our state is equivalent to a county.

Under present laws in our state, the Whitney is not permitted to establish branches outside the Parish of Orleans.

There is a rapidly growing industral area in [7] adjoining Jefferson Parish up river from Orleans, in the area of that green star.

There are one or two other items that should be pointed out. There is a causeway across the Lake Pontchartrain, that ties into this (indicating on map)—comes down through here—provides a through traffic from across the lake down to that point. That is the reason for the concentration in this immediate area.

The causeway is here (indicating on map).

The industrial development, in the form of large plants, more or less extends up river on both sides to Baton Rouge, about 80 miles. Industry is becoming more conscious of fresh water as a valuable natural resource which is becoming scarce in older industrial areas, such as in Texas and in the Birmingham, Alabama, area—around Birmingham.

There is, therefore, good reason to look forward to continued industrial growth along the river with a concentration of smaller industries in Jefferson Parish.

New Orleans is located on low land, all of which requires levees and drainage before it can be used for industrial and residential purposes. This makes the land values high and tends to concentrate population. At present, most of the open land available for housing development is between Lake Pontchartrain and the Mississippi River in Jefferson Parish, the area I pointed out to you. That area residentially has been [8] growing rapidly.

The management of the Whitney National Bank has been studying and weighing alternative methods of entering Jefferson Parish to serve our present customers who have moved their plants there, or who have gone there to live and to participate in the further growth of that area.

The feasible alternatives are either an affiliate bank owned by a few large stockholders of the Whitney—stockholders whose holdings in the original bank are so large they cannot afford to part with the holdings in the small one—or the establishment of a holding company which would own all of the stock of the present Whitney National Bank and own, likewise, all of the stock of the Whitney National Bank in Jefferson Parish.

When I refer to "all," I mean all except the directors' qualifying shares. I mean that will apply all the way through.

This has been a problem demanding action by Whitney management since the Comptroller of the Currency in 1955 allowed our largest competitor in New Orleans to operate in Jefferson Parish by chartering the National Bank of Commerce in Jefferson Parish, an affiliate of the National Bank of Commerce in New Orleans.

The officers of the Whitney National Bank determined in 1960 that the holding company was the proper solution, [9] provided we could put the ownership of the present Whitney National Bank of New Orleans stock into such a company and, by the use of Whitney assets, establish a bank in Jefferson Parish, which would likewise be fully owned by the holding company.

The Comptroller of the Currency has concurred in a program which has the effect of putting the ownership of the present Whitney National Bank stock into the Whitney Holding Corporation, through this Crescent City National Bank that was mentioned, and to the establishment of the Whitney National Bank in Jefferson Parish with funds from the present Whitney National Bank, the stock of which would be also owned by the holding company.

The Comptroller's action, however, is subject to the approval of this Board of the application of the Whitney Holding Corporation to establish the wholly owned Jefferson Parish subsidiary.

This subject was first discussed with the legal staff of the Federal Reserve Board in the fall of 1960. Your staff called my attention to something which I should have under-

stood if I had been more familiar with the Holding Company Act; they called my attention to the fact that by completing the first part of the program—in other words, the stock of the Whitney National Bank of New Orleans would be wholly owned by the Whitney Holding Corporation—we would not need come to this Board at that stage since the holding corporation would then own [10] only one bank and would not be a holding company under the Holding Company Act.

If we had done it that way, we would clearly now be asking you only for permission to become a holding company by establishing a new bank in Jefferson Parish and by acquiring all of its stock.

Because the Comptroller did not want to take the first step—ownership of the Whitney National Bank stock by the Whitney Holding Corporation—unless we simultaneously went forward with the second step, we are here before you today with our application in this form.

The Comptroller has already concurred in the acts required to consummate the first step and granted preliminary approval of an application for charter for the Whitney National Bank in Jefferson Parish. He has made the normal investigation by his examiners in the field, along with examiners in your office and the FDIC.

We understand that he has advised you that these charters will be issued if and when the Federal Reserve Board approves this application for a holding company, which will own the stock of the present Whitney National Bank of New Orleans and the stock of Whitney National Bank of Jefferson Parish.

On the recommendation of the Comptroller, we proceeded with our stockholders' meeting submitting to stockholders our entire program and the reasons for it.

[11] On November 29th, last year, our stockholders met. We had 105,824 shares out of 112,000 outstanding represented at the meeting; 93,645 shares voted in favor of the program and 12,145 shares voted against it. I take it this represents overwhelming approval by our stockholders.

Now then, this general statement of a physical layout at home and of our program, which Chairman Martin very well summarized in stating the purpose of this meeting, provides the general background against which I would like to discuss the five items under the Holding Company Act as a basis for action on the application.

Mr. Monroe is handing you a copy of our annual report as of the year end and I would like for you to turn to the statement which is in the middle of it. He will also give you a set of figures which cover the operation of the Whitney National Bank from 1936 to June 30th. I left the last one June 30th simply because they conform to the application which was filed early in July.

The last line on that is not a year-end figure; it is a mid-year figure therefor.

I give you these because to me these figures are the best answer which I could make to factors (1), (2), and (3), which the Holding Company Act sets up as factors governing the determination of application for approval.

The form of the capital structure of the Whitney [12] National Bank of New Orleans—$2.8 million of capital, $27.2 million of surplus, and $13,835,000 undivided profits—evidences conservative management over a long period of years.

The figures show that there have been no mergers of other banks into the Whitney and the capital structure stated in those figures cannot be created except out of the accumulation of earnings. It cannot be set up in a day.

Insofar as factors (1), (2), and (3) of the Holding Company Act, the items to be considered are applied to the new unit in Jefferson Parish. The management of that unit will be supplied from the Whitney National Bank of New Orleans. That unit will have the benefit of the training program of the old bank and can select the personnel best adapted to its needs.

As to the "prospects" of the old bank, which is one of the items in the first three categories, I am sure the Board is willing to assume that the old bank will continue to do at least as well in the future as it has in the past.

As to the "prospects" of the unit in Jefferson Parish, it should share in the same sort of growth as the affiliate of the National Bank of Commerce in New Orleans, our competitor, which has in the 6 years of its operation in Jefferson Parish accumulated in excess of $18 million of deposits. The continued growth of the industrial area and residential area of New Orleans into Jefferson Parish must mean an expanding need for banking services.

[13] As a matter of fact, in that connection, the figures for the banks there are interesting. The Merchants Savings Bank, $13 million deposits in 1956; $17 million in 1960.

Merchants Trust Company in Canada, 1956, $3 million; 1960, $6 million. National Bank of Commerce in Jefferson Parish, $9.4 million in 1956; $18 million in 1960. Putting them altogether, it is a 63 per cent increase in 5 years, which is I think an evidence of the growth of the community and the need for expanding banking service in the area.

As to the fourth factor—"the convenience, needs and welfare of the institution and the area concerned"— the sheet of figures which you have before you showing the results of the Whitney National Bank of New Orleans' operation since 1936 giving the growth in deposits and the increase in loans evidence the character of service and the extent to which it has served the convenience, needs, and welfare of the area in which it is operating.

The Whitney National Bank of New Orleans will continue in exactly the same form as it is now except for the withdrawal of $650,000 in capital funds which will be put into the Jefferson Parish unit as capital for it.

As to the criteria of the fourth factor as applied to the National Bank of Commerce in Jefferson Parish, our application filed with you in Exhibit D contains letters from such concerns as: Plymouth Cordage Company, a twine manufacturer; [14] Charles Dennery, Incorporated, a large manufacturer and dealer in bakery supplies—they operate a plant which we have financed in the immediate area in Jefferson Parish, this green star on the map (indicating map), they operate warehouses in Dallas and Atlanta; Mr. O. E. Alexander, Jr., Zone Manager, Chevrolet Motor Division; General Motors Corporation, they have finished a large building in which they distribute parts, which is located in that immediate area; The Freiberg Mahogany Company, manufacturers of mahogany lumber and veneer; Rausch Naval Stores Company, manufacturers, dealers, and exporters of turpentine, rosin, and pine tar; Great Atlantic and Pacific Tea Company, which has an office and warehouse there; Boyce Machinery Corporation, distributors of caterpillar equipment and operate throughout the state with offices right at the bridge in the neighborhood of the green star; Crescent Materials Service, a wholesale building supply dealer; Sears, Roebuck & Company, which has its warehouse and service operation in that immediate area; Max N. Tobias Bag Company, a bag manufacturer and also a distributor of cattle feed and chicken feed throughout the Central American countries and the South

American countries, around the Gulf and in the island. They use our foreign department.

All of these concerns are customers of Whitney National Bank. Their letters certify to their need for Whitney service closer to their operations in Jefferson Parish than our present facilities.

[15] We could have brought these here and others as witnesses as to the need and convenience of this Whitney National Bank in Jefferson Parish. As I read the list, I realize we failed to ask one of our largest customers in the immediate vicinity of the proposed Jefferson Parish bank to write a letter. His plant is immediately across the bridge. That concerns the Avondale Shipyards, Incorporated. I am going to tell you a little about that because I think it indicates the kind of service that will be needed and is needed in an area of a small industry.

That concern, Avondale Shipyards, began doing business with us as a barge repair yard which had acquired the tracts down the levee used by the Southern Pacific Railroad for loading its railroad cars onto ferries before the construction of the bridge.

With the tools at hand and those facilities in the period preceding World War II, they accepted the Navy contract to build three large Navy tugs, each costing between $1 million and $1.5 million. This company had $65,000 worth of working capital.

We financed that particular contract because the management was capable. We financed them throughout the war period without V loan guarantees or other support.

The original owner sold the property a few years ago for $14.5 million.

We are still the company's sole banking connection.

[16] But the affiliate of our chief competitor has two units in Jefferson Parish closer to this customer of ours than our nearest unit in New Orleans.

The same is true of each of the companies listed in the letters.

Our application file also shows that the Illinois Central Railroad is pressing the development of its lands for use by small industries.

We feel that those industries are entitled to the choice of banking service of more than one New Orleans-based bank.

I think that is important. In other words, we have one

New Orleans-based bank in the area and serving the area and, reading the categories as they are set out in the Act, it seems to me that the customer is entitled to a choice, not being forced to go to one New Orleans-based bank in that Parish if he needs service that goes beyond the ability of the small or independent banks to serve.

Inasmuch as the Whitney National Bank in Jefferson Parish is a new unit, I take it that the National Bank Examiner, on behalf of the Comptroller, your examining staff, and the FDIC examiners reported to each of their agencies on the general convenience and needs of the community.

Since our application has been on file with you, in fact since I wrote the memorandum, the Comptroller has granted [17] to the National Bank of Commerce permission to open an additional unit, making five units I think on the east bank of the river. And the state authorities have also authorized a state institution, the location of which we had originally proposed a branch.

I have attached to this a letter in which they are offering stock. They describe the possibilities of Jefferson Parish in glowing terms.

The one comment that is made is that "an availability study, made before applying for the charter, showed that there was room for six more banks in Jefferson."

I don't know how you determine it that accurately.

"The growth of Jefferson Parish has been amazing. It has had the largest population increase in this area. Retail sales have jumped from $45 million to $206 million. Effective buying income has climbed from $44 million to $382 million. Such tremendous economic growth, in our opinion, leads us to believe that an aggressive bank like ours has an excellent future."

Those are statements from competing sources which may lend some weight.

I have trouble in keeping factors (4) and (5) apart. They are inclined to mix. I think I can deal further with (4) and (5) by stating to the Board the factors which influenced the management and directors of the Whitney National Bank of New Orleans to adopt the holding company route and look to common [18] ownership of all the National Whitney Bank stock in New Orleans and stock of the Whitney National Bank in Jefferson Parish by a

holding company. That, of course, is subject to qualifications and directors' qualifying shares.

The management felt that it was the soundest method of pooling the deposits of our customers and our capital funds for the use of our customers and the community in the development of the community.

The New Orleans metropolitan area, after all, is a unit only broken into pieces by imaginary boundary lines that run through the population centers.

The form of ownership of the Jefferson Parish unit which we propose will assure to all customers of that unit access to the large loan limits of the combined banks. They allow the security which arises out of the fact that the large bank and the small bank have identical ownership as well as management.

They will be assured that notwithstanding the smaller capitalization of the Jefferson Parish bank, the large bank cannot afford to let anything happen to the smaller to the detriment of the depositors.

As we see it, in an affiliate relationship, we have no way of knowing or no way to prevent the stock of the two institutions from drifting apart. It is my understanding that if, in the case of an affiliate, less than 50 per cent of its stock is owned by the stockholders of the other bank—in other words, [19] if the common ownership drops below 50 per cent—supervisory authorities must require that there be no interlocking of officers or directors.

That could happen in a period of stress and be embarrassing to both banks. It could even be embarrassing to the whole banking community in my opinion.

In an affiliate relationship with different stockholders, there is a constant conflict of interest as between those stockholders in every transaction between the two banks. With interlocking officers and directors, every transaction is open to question as to which bank had the advantage in the transaction.

That could be eliminated under the approach that we have taken.

From a customer's point of view, he has a similar conflict of interest. If he lives in the Parish, if he operates in the Parish, he carries his balance in the smaller bank, he does not feel that he has the same right to go into the

larger bank to the senior officers to discuss his credit and management problems.

I think that is one of the most important services a bank renders aside from lending money, discussing the customer's problems with him and helping him arrive at a proper decision, letting him convince the bank management that his plans are correct and are right.

He would not feel that he had that privilege of coming [20] in to the larger bank's senior officers unless there were that common ownership of the two banks.

With the common ownership, he would have no hesitancy to come over; he would feel it is all the same general situation.

As to the competitive factor, monopoly factor, which goes into (5), inasmuch as we are starting a new unit from the ground up, we are not expanding in the adjoining community and absorbing by merger or consolidation banking resources which already exist.

Any expansion in the Whitney Holding Company system, once we are granted that authority to set up a holding company system which comes about by reason of this second unit—namely, the Whitney National Bank in Jefferson Parish—will come about because industry located in Jefferson Parish near that bank, or residents of Jefferson Parish find that unit convenient and our banking service better than some other service which is already there. They will come to us voluntarily because we are offering convenience, or there is a need not presently being filled, or even because they recognize soundness in this approach which is lacking in the affiliate approach.

Now, in order to complete your records, there will be some additional exhibits filed with you.

I will be glad to try to answer any questions that the Board has.

Again, I apologize for taking your time on what is to [21] us an important matter when you are confronted with much larger problems, but this is an important one to us.

Chairman Martin: This is an important matter to us also.

Questions? Does the Board have any questions?

Governor Mills: Mr. Chairman, if I might ask Mr. Berry, the question could carry over to the other gentlemen who are making statements—this is a very broad question, but I gather from the map and your discussion and from the

matter already available to the Board that the banking area for New Orleans should in fact be considered the metropolitan area and not necessarily the legal boundaries, or parish boundaries that are set by state law.

Now, viewed in that way, and the fact that there are these parish boundaries, it might be construed that the parish boundaries are comparable to the trade barriers that limit the movement of commerce and that have come under discussion in various states and different situations.

Now, if those state barriers were removed, could you perceive a different situation than the one that now confronts you?

In other words, if those barriers were removed and the privilege of branching were permitted into those areas, would you feel that the attitude of the state and Federal banking authorities would be different than those that have been [22] true in the past?

To put it more particularly, within the limits of the City of New Orleans where branching is now allowed, has there been any disposition of the public authorities to refuse the applications of the banks within the city to establish branches for the convenience and the service of their clients, and has there been any record that where those branches have been permitted and established, that the operation of any of them has been considered in official lights as having been detrimental, competitively, to any of the other banks?

Mr. Berry: No.

Governor Mills: Now to ask the question, one further point, if you extended that line of reasoning to the area in which you would now propose to enter through the holding company vehicle, would you consider or would others consider that what is tantamount to the establishment of a service as compared to a bank could prove in light of experience detrimental to the competitive efforts of smaller banks?

Mr. Berry: Taking New Orleans first in which we are permitted to establish branches, I know of no branch being refused as a matter of fact. And I know of no harm that ever came from starting one.

As a matter of fact—I wouldn't say that bankers are always guided by sound reasoning, but the pinch of operating costs has a tendency to control it anyway. If you move into a [23] territory that won't support a branch, it is simply a drain on you.

If branch banking were permitted in Jefferson Parish, I wouldn't be here because it would be much simpler to have it by way of a branch. We would eliminate one additional bit of supervision which we will have from your agency if we could go directly by branch. But that is not possible. We see no signs of it coming about by legislative action. And before we move—as a matter of fact, we waited rather long to move. As I say, our principal competitor has been in the parish since 1955 and our problem has been—we have been unwilling to go with an affiliate which we couldn't hold onto necessarily.

It doesn't become a part of our organization; it is just sort of hanging loosely. You have these conflicts of interest and it is awkward.

The thing that makes this interesting to us is the ability to approach the branch phase of it. From the point of view of service to the community, there isn't a shadow of doubt in my mind that there is the need for service. I don't think it hurts anyone to have the competition. And frankly, I don't think we will get business, as I said, in our units except insofar as we provide something that someone else isn't providing that the customer wants.

This area is growing very rapidly. At the moment it is the only land that is really readily available for building. [24] It doesn't have all the drainage advantages that the old City of New Orleans does. There are movements, there is discussion of some drainage to the east, toward the Gulf Coast, but that is still to come. But the real industrial area is going to be up-river because they are going there because there is fresh water and the Mississippi River as a fresh water stream is a tremendous natural resource.

A little farther up the river, there, you have some oil refineries. Our list of customers is incomplete—we have oil refineries and aluminum plants, sugar plants, sugar refinery. It is a growing industrial area that will need servicing. It should have a relationship with a large bank and that would have to be a downtown bank. Because chances of developing enough facilities in an independent unit there are not such as to enable anyone to take care of the needs of one of those larger companies involved.

Does that answer your question?

Governor Mills: Thank you.

Chairman Martin: Are there any other questions from the Board? (No response)

If not, thank you very much.

Mr. Berry: Delighted.

Mr. Monroe: Excuse me, Mr. O'Connell, I would like to complete the record.

Do I need to dictate into the record under your [25] procedures what we would like to have in the record that has been presented or will that automatically become a part of the record?

Mr. O'Connell: I would ask the Board that all the documents that have been presented by applicant be admitted.

Chairman Martin: No objection? (No response.)

They will be admitted as part of the record.

Mr. Monroe: That would also include the proceedings before the staff, the application?

Mr. O'Connell: The application and the previous submittals by you, supplemental application, are now part of the record and will be before the Board when it deci 'es this matter.

Mr. Monroe: Thank you very much.

Chairman Martin: We will proceed now, then, with Mr. Roussel and Mr. Sehrt.

ORAL STATEMENT OF LOUIS J. ROUSSEL, AMERICAN STATE GULF NATURAL GAS CORPORATION AND UNIVERSAL DRILLING COMPANY, INC.

Mr. Roussel: May I sit down?

Chairman Martin: Yes.

Mr. Roussel: My name is Louis J. Roussel.

I want to tell you that I left school in grammar school and if I make any grammatical errors, I will ask you to forgive me. You will know why. I have been working since I have been a youngster.

Now I will present to you, the members of the Board of Governors, the opposition to Mr. Berry's Holding Company deal.

I am appearing in opposition to the Holding Company [26] for the various reasons that I will list, as I will proceed.

First, the writer and his company are substantial stockholders in the Whitney National Bank. We believe that the

holding company plan is merely a subterfuge to eliminate cumulative vote.

We believe that it is a device that they will use in order to gather in all of the millions of dollars of hidden assets that the Whitney National Bank now has into a holding company without cumulative vote.

Second, I am enclosing a copy of a charter that they have filed to be used as a holding company charter, and I am sure that after you gentlemen take a look at this corporation that you will see what I see in it, that one man can control it at his will or whim, the way he sees fit.

Third, I am enclosing a copy of a purchase of real estate that was made by the Whitney National Bank in Saint Mary Parish, Louisiana, which is considered to be oil property.

This property is located 75 to 100 miles from the City of New Orleans. It could not be possibly used for any bank building or any use of the Whitney National Bank, in complete violation of the national laws of the United States governing national banks.

Four, on July 31st, I wrote a letter to Mr. R. M. Gidney, the Comptroller of the Currency. It is enclosed. It is self-explanatory. I informed Mr. Gidney that the Whitney [27] National Bank was listing the members of the Advisory Board and the directors all grouped together in such a manner that the public could not tell which was which.

Mr. Berry presented you with a copy of the financial statement of the Whitney Bank. If you will look at it, you will see that it is just that way, gentlemen.

I told Mr. Berry at that time that Mr. Taylor, at the annual meeting—Mr. Taylor had written me a letter that he would notify me to write them differently. I asked Mr. Berry that question at the annual meeting. He told me he didn't think he had to do that.

Five, on September 22, 1961, I forwarded to each stockholder and the Comptroller of the Currency a brochure which I had prepared showing the dealings between the Whitney National Bank and one of its directors involving property on Veterans Highway and Jefferson Parish.

It is alleged in that brochure that the property was sold for below its actual value, that many people had gone into the bank inquiring about this property and were given such a cold shoulder by Mr. Berry that most of them abandoned the idea of trying to buy. Others weren't able to obtain any

information whatsoever and, gentlemen, I have names of these people that I have interviewed. Consequently the property was sold for far below its actual value.

Mr. Berry answered that letter and brochure by stating [28] that the land deal was a relatively simple one.

At the annual stockholders' meeting on January 9th, I asked Mr. Berry the following question:

"Mr. Berry, if the land deal in Jefferson Parish on Veterans Highway and the lot on Carrollton and Plum was, as you stated, a relatively simple matter, would you please explain to the stockholders why the lot was purchased by Mr. Favrot's company, Carondelet Realty Corporation, who in turn sold it to Palmetto Realty Corporation and two of Mr. Favrot's relatives, who in turn sold it to the Whitney National Bank in a deed that did not recite the consideration?"

Mr. Berry answered at the meeting that they handled it as a trade in order to save $25,000 in taxes; that would have been paid to the Federal Government.

If this is so, then I charge that Mr. Berry and Mr. Favrot as a director entered into a one-sided agreement in order to "fudge" on the Government to the tune of $25,000 that was justly due.

Mr. Berry is now in front of the same Government asking them to help him form a holding corporation in order to eliminate cumulative voting. No other reason; cumulative vote.

He has "fudged" on his own Government by his own admission to the extent of $25,000. I was raised under the theory that if you will take a little, you will take a lot. I wonder if Mr. Berry has systematically "fudged" on larger [29] amounts against his Government?

In Mr. Berry's own letter, he states as follows, and I am going to quote him, gentlemen—I am judging him by what he said himself and this is what Mr. Berry said:

"The lot on Carrollton Avenue was originally acquired at our suggestion at a price of $100,000."

He told him to go ahead and buy that lot for $100,000, and that he would take it as part trade in another deal, that he was selling him some of the bank's property for $403,230.00.

Gentlemen, I issued a brochure on that land deal.

The St. Bernard Voice, a paper in St. Bernard Parish, wrote a front-page editorial. I have the answer to that brochure that Mr. Berry sent out and I would like to have you read it.

Six, on October 27, 1961, the writer mailed another release which was Special Release Number 6, to the stockholders of the Whitney National Bank, mailing them a copy of a petition that had been filed by the writer to examine the books of the Whitney National Bank.

The Whitney National Bank took the position that the writer had only 725 shares of the capital stock of the bank in his name and the rest was owned by the corporation which I am in charge of, that I could not see the books of the Whitney National Bank.

They further took the position that I was a [30] competitor because of my holdings in the National American Bank and under the Louisiana Corporation Act, that a competitor had to have 25 per cent of the stock of the bank in order to look at the books.

This case is now on appeal from the lower court, that is in regard to our efforts to see the books of the Whitney National Bank. This suit was filed in order that we might see if there were any more dealings like the one Mr. Berry made with one of his directors and in order that the stockholders might file a suit to recover that money.

I would like to tell you gentlemen now if this is turned down, I am going to bring a suit for the stockholders of the Whitney National Bank to recover what I believe to be approximately $1,800,000 that went into that land deal.

We have several witnesses who will testify they were unable to bid on the property or unable to buy, even though they were willing to pay more money than was paid by the directors of the Whitney National Bank.

I want you to know that I have a letter in this file from Mr. John Schwegman, who is a large chain operator of grocery stores, super markets. I have his letter under his own signature.

I am also enclosing the editorial of the paper, St. Bernard Voice, that I spoke to you a moment ago about.

Seven, I am also enclosing a complete set of all the [31] correspondence which was exchanged between myself and Mr. Berry in this proxy fight. I trust that you gentlemen will not allow the Whitney National Bank to form this

holding company because we believe that, at this time, all they have is a mythical corporation they are trying to put into a holding company.

Eight, I believe when Congress adopted cumulative voting in national banks, they did so in order to protect the small stockholders and here comes an outfit trying to circumvent the laws of Congress.

This was best demonstrated by the Whitney National Bank on January 9, the last annual meeting of the Whitney National Bank, when they reduced the number of directors from 20 to 7 in order to prevent minority representation on the board of the Whitney National Bank.

We are positive that this is the only bank in the country of its size that has as few as 7 directors at this time.

We believe that when Congress said there should be not less than 5 nor more than 25 directors, that Congress meant that the minimum would be used in the formation or the organization of a bank but did not mean reducing the number of directors on the board of any national bank in order to prevent minority representation on that board.

To show what puppets were serving on that board, Mr. Berry had them accept his decision to cut that board as though they were all employed as regular employees of the Whitney [32] National Bank.

Therefore, gentlemen, I hope you will prevent the Whitney National Bank from forming this holding company.

Nine, at this point I respectfully request of you gentlemen, all of whom are well voiced in the banking practices existent throughout this nation, that you search your memories and knowledge to see whether or not you can point to any one single interest in which the board of directors of any large institution has been decreased by even 1, 2, 3, 4, or 5 directors.

When Mr. Berry moves, he goes all the way. He reduced the board of this bank 65 per cent by the stroke of his pen, in one single instance, on one single day.

Gentlemen, there has to be a reason and I submit that in this instance, both are ulterior in nature.

Ten, Jackson, Payne, and Webster released a statement that they were unable to obtain information from the Whitney National Bank. The information they were seeking from the bank was the income from oil and gas properties. And, gentlemen, I examined their application. In no place

do they show what they received from oil and gas, or what they received from the rental of real estate.

As you know, several of the banks in New Orleans closed during the banking holiday because they were heavily loaded with real estate. All of these banks have paid the depositors their [33] money back, plus the interest, and the stockholders have been paid a lot of money.

The Whitney National Bank had a lot of these properties. Have they paid anything? They had maintained that $4 dividend until I got on them—and then what happened? They raised it to $12, and they said I had nothing to do with it.

Gentlemen—but I want to tell you what they did raise, they raised Mr. Berry's salary. He couldn't get along on what he was getting when he originally started. He had to get additional money. But the stockholders had to sit there and wait.

Now, I heard him talk about an aggressive bank. I have some figures here, gentlemen.

I am not going to use the National Bank of Commerce because they started another bank in Jefferson Parish. I am going to use the High Bunyun National Bank in New Orleans.

In 1951, they were a $155.1 million bank; in 1960, $170 million, an increase of over 38 per cent.

First National Bank of Atlanta, in 1951, $341 million; 1960, $448.4 million, an increase of 30 per cent.

First National Bank of Dallas, 1951, $508 million; 1960, $870.9 million, an increase of 68 per cent.

Republic National Bank of Dallas 1951, $459 million; 1960, $1.012 billion, over 100 per cent increase.

And now we come to the "aggressive" Whitney National [34] Bank, 1951, $385 million; 1960, $425 million, an increase of 15 per cent.

Now, gentlemen, I spoke to you about that charter. There are some things in here I want to tell you about.

I do not believe that you gentlemen will recommend or will let them adopt this charter for a holding company, because I know that with these provisions in the charter, that you yourself wouldn't buy any stock in it. And I have enough faith in you gentlemen that you wouldn't let someone form a corporation that would hurt other people.

I want to read it to you if I may.

This is Article VIII:

"All powers of the corporation shall be vested in a Board of Directors composed of not less than three nor more than twenty-five, the precise number of said Directors within said limit to be fixed by the Directors."

In other words, to be fixed by themselves.

Now, gentlemen, here is a lulu:

"Directors of the corporation need not be stockholders."

Now, for what earthly reason would a man want to serve on a board that is not a stockholder? Or unless he was trying to please the president of that corporation, or for a monetary consideration?

Going a little further, gentlemen:

"Any Director absent from a meeting may be [35] "represented by any other Director or shareholder, who may cast the vote of the absent Director according to written instructions, general or special, of said absent Director."

Lo and behold, the man running this corporation can give him written instruction, have him sign his name, go up on the second floor and hold a meeting with his secretary.

I tell you, this is ridiculous, to say the least.

Gentlemen, it is in here, I am going to read you another paragraph in here that is really good. It is Article VI:

"The authorized capital stock of this corporation is fixed at $1,120,000 shares of common stock, without nominal or par value. Every share shall be equal in all respects to every other share. No transfer shall be binding upon the corporation unless recorded upon its books. All shares shall be fully paid for and non-assessable."

You gentlemen know better than that, because if the National Bank goes under, you can assess the shares of a holding company.

Now listen to this:

"Without necessity of action by the shareholders, shares of stock without par value may be issued by the corporation, from time to time"—without action by the shareholders—"for such consideration as may be fixed, from time to time, by the Board of Directors, and any and all such shares so issued, if the full fixed consideration, whether

cash and/or property [36] "and/or good will, for such shares has been paid or delivered, shall be deemed full paid stock and not liable to any further call or assessment, and the holder of such shares shall not be liable for any further payment thereon."

They can issue it for what they want to even though they are not stockholders.

Of course, it would not affect them if they were directors and they wanted to issue it, it wouldn't be hurting them; they wouldn't be diluting their stock, they don't have any.

Now, gentlemen, believe me, if they are allowed to go ahead with this charter, I am very active in 10 or 15 corporations, but in the future if I organize a corporation and this is passed, I am going to copy this corporation charter in toto and I am going to advertise that it was approved by the law firm of Monroe and Lemann, that it was passed upon by 75 per cent or over 75 per cent of the stockholders of the Whitney Bank, and it was approved by the Board of Governors of the Federal Reserve System.

Gentlemen, this is a very dangerous thing and I know that you gentlemen haven't looked at it—I know you haven't—and I wish you would before you pass on it, and I know you will.

Now, gentlemen, all the rest of the exhibits, including the land deal that I put out in this brochure (indicating), are in this file.

I want to tell you that I appreciate the opportunity of [37] appearing before you. I want to thank you. And if there is any question in my humble way I can answer, I will try to do it.

Thank you very much.

Chairman Martin: Any questions? Are there any questions anyone would like to ask?

Governor Robertson: I would like to ask a question.

You have in front of you the charter of the holding company, I take it.

Mr. Roussel: Yes, sir.

Governor Robertson: Is there any provision in that for cumulative voting?

Mr. Roussel: No, sir. None at all. It has been abolished altogether, sir.

Now, that is the idea, gentlemen. The Whitney Bank

has—who knows how many million dollars worth of assets. We have never been able to find out.

Now, when he tells you that the bank has been earning so much, it is not in the application downstairs how much is coming from oil and gas. And I know that there is a good bit of money coming from oil and gas.

But Mr. Sehrt, who is a stockholder, asked that question at the annual meeting and Mr. Berry told him, "Why, you represent the opposition. I don't know if I want to tell you that."

Gentlemen, as a stockholder, I have never been able to find that out and I have been trying, believe me. But I tell [38] you, if you leave this thing just like it is, I assure you I am going to find out—because I am going to find out in a courthouse.

Chairman Martin: Does anyone else want to ask Mr. Roussel a question?

Mr. Roussel: Gentlemen, I would like to file, Mr. Chairman, if I may, all of these exhibits.

Chairman Martin: We will receive them all.

Mr. Roussel: Thank you, sir.

Mr. O'Connell: Mr. Chairman.

Chairman Martin: Yes, Tom.

Mr. O'Connell: Inasmuch as Board's counsel or the staff have not seen these exhibits, may I recommend that they be received as you have indicated, Mr. Chairman, subject to the Board's determination of the relevancy and pertinency to the issues involved in this hearing.

Chairman Martin: All right, it is so ordered.

Did you wish to say something, Mr. Sehrt?

Mr. Sehrt: Yes, sir, I certainly do.

May I proceed, sir?

Chairman Martin: Yes.

Oral Statement of Clem H. Sehrt, Sehrt & Boyle

Mr. Sehrt: Mr. Chairman and members of the Board of Governors, I represent the minority, practically, that voted at the Whitney Bank meeting and, without the necessity of listing to you each and every client that I represent, among them is [39] Mr. Roussel.

I have read with a great deal of interest the plan and the application which has been submitted by the Whitney and I have some comments regarding the plan, because, while it is

apparent that the Whitney National Bank is forming a holding company to evade or avoid or to dispense with cumulative voting, nevertheless I say that the application does not conform to the law and the statute.

I hope in my humble way to be able to convince you that this application does not conform to the law.

Answering Governor Mills's question about the Parish of Jefferson, in our home state a parish is similar to a county in most states. Jefferson Parish would be part of the metropolitan area of New Orleans. However, it is a separate and distinct parish and under statutory state law, you cannot have a branch in a parish other than the parish in which that particular bank is operating.

I don't think that counsel for the Whitney or Mr. Berry would dispute the fact that he could not, as such, open a branch in Jefferson Parish. I must concede that he would have to either form an affiliate, such as the National Bank of Commerce has accomplished, or they would have to get into the Jefferson Parish area by some other manner or formation of a bank.

My appreciation of this application, the substance of it, was set forth in a communication which I sent to Mr. Saxon, [40] the Comptroller of the Currency, under date of December 22, 1961, copy of which I forwarded to this Board, which I understand from your counsel will be available for your examination.

In order to approach this thing from the standpoint of whether or not this application is a valid application conforming to the law and whether or not it should be considered, I must concisely state what Whitney attempts to do here.

The plan provides for the Whitney National Bank to furnish $350,000 in exchange for 5600 shares of Whitney Holding Company stock.

The 5600 shares would be distributed to all of the shareholders of the Whitney National Bank in the proportion of 1/20 of one share to each share of the Whitney National Bank. The Whitney Holding Company with the $350,000, which it receives from the Whitney National Bank, would use those funds for the organization of the Crescent City National Bank, and would receive in return 112,000 shares of the Crescent Bank at $2.50 par value.

The Whitney National shareholders would surrender all

of their shares to Whitney Holding Company and receive in exchange 9/920 shares for each share he rendered.

The net effect, finally, would be that the Whitney National Bank shareholders would have 10 shares of the Holding Company stock for each share of Whitney National Bank stock.

Now, that is the plan. That is the substance of the [41] plan and that is the net result if the plan is accomplished.

The Whitney National Bank has presented to the Comptroller a set of articles of association in which it says, "We propose to form a bank—to wit: for the sake of convenience—called Crescent, and here are our articles of association."

Now bear in mind, gentlemen, that bank has not come into being. That bank does not exist. It is merely a set of articles of association signed by certain directors and submitted to the Comptroller under a form that would conform to the National Banking Laws, either acknowledged before an officer or a notary public qualified to give an oath.

However, the Crescent Bank is not in being. The Comptroller has not given it a permit. It is merely a paper corporation filed with the comptroller.

The Crescent has no stockholders. The only funds that would be available to Crescent through the holding company situation—which of course has not been approved by this body, which you are here today for—the funds are taken from where? The funds are taken from the Whitney National Bank's treasury to create what? To create a symbol, to create a set of articles of incorporation which they say is a proposed bank, and they take the money out of one pocket and they put it over here and they say, "We propose to create the Crescent Bank."

Now the Crescent Bank does not exist. It has no stockholders. It has no depositors. It has no place from which [42] it can do business. It cannot even do business until such time as the Comptroller says, "I give you a permit: you have a right to function."

It exists how? It exists by virtue of the funds, the funds supplied to it by Whitney National.

Now, the statute provides—and I have examined all of the hearings under the Holding Company Act and I have examined these committee reports, and I can find nowhere in these committee reports or in these hearings or in this statute where there is provision for the consolidation of a

nonexistent bank, for the consolidation of one bank with a bank that has never functioned, with a bank that has never existed for a day, with a bank that doesn't have a single stockholder, with a bank that has never functioned.

I say the purpose of this holding company statute and the general provisions of the law is that a consolidation must take place of two banks that exist in law and in fact. And I say, gentlemen, that Crescent does not exist in law until such time as the Comptroller gives them their permit, and it does not exist in fact because it has never functioned a day, it has had no place from which to function, it has had no headquarters, it has no minute book, it has no stock book, it has no minutes of its board of directors—it is a myth. It is a paper corporation, a shell—which they say will come into being.

Now, how do they say it comes into being? They have a [43] long agreement here which they call a consolidation agreement and which in effect accomplishes exactly what I set forth in brief at the outset of my discussion.

If this plan is adopted and the shareholders have voted it, what happens? The charter—this piece of paper (indicating) filed with the Comptroller—becomes the charter of the consolidated bank and the name, Crescent, is changed to what? The name Crescent is changed to Whitney National Bank. And what is that? The name Crescent is changed to the Whitney National Bank, which is the exact bank which exists today—the Whitney National Bank.

So I have branded this in a communication to the Comptroller and I have told him verbally—and I tell you, gentlemen—that this is a legal maneuver, it is a scheme to evade the provisions of the Holding Company Act and to accomplish a holding company not by the means set forth by the Congress of the United States. Because you begin with a Whitney National Bank which itself takes its own funds, which it doesn't have a right to do under the banking laws, and puts them over here and creates Crescent, and then says Crescent, you merge with us and when we get through merging or consolidating, we are what? We are the same thing we started out with: Whitney National Bank—with the same articles of association and the same charter, the same assets, the same directors, same president, same officers, the same everything.

[44] So I say that this is merely a figment which has been

created to attempt to meet the provisions of the Holding Company Act.

Now I say, further, that in the amendment of 1956—and I am reading from Section 1845, it says that "From and after May 9, 1956, it shall be unlawful for a bank to invest any of its funds in the capital, stock, bonds, debentures, or other obligations of a bank holding company of which it is a subsidiary or any other subsidiary of such bank holding company."

Now, what would Whitney National Banking if you gentlemen approve this application?

If you approve this application and the Comptroller approves this consolidation and merger, the Whitney National Bank will have accomplished indirectly what that statute prohibits them from accomplishing directly.

They can't invest their money in a holding company. And the statute so provides with the amendment of 1956. But they will have invested their money in a holding company, they will have put $153,000 in a holding company to create a holding company.

At the conclusion of the maneuver or the scheme, you will have one entity, the same entity that began.

Now, gentlemen, that is not a merger; that is not a merger within the purview of the law.

This act itself sets forth what is a merger and it [45] sets forth what is a consolidation. In brief, under Section 89, it says: "One or more national banking associations with the approval of the Comptroller"—one or more national banking associations with the approval of the Comptroller —"can make a consolidation or a merger."

You can't merge with yourself. You can't consolidate with yourself. You can't create some figment merely on paper so you can accomplish a merger.

And I say to you gentlemen at the conclusion, you have what? You have the same Whitney National Bank—with what?—with the shareholders no longer owning the shares of the Whitney National Bank, but the shareholders owning 10 shares of the Whitney Holding Company. And the Whitney Holding Company has destroyed, has written out with its pen the right of cumulative voting.

The whole scheme is an evasion, of course, to write out the privilege of cumulative voting.

Now assuming for the sake of discussion that the plan

is approved, which I say it should not be, and assuming that the Comptroller approves the consolidation—and I am satisfied his office has tentatively approved it because your records should show that, and he has told us that they have tentatively approved it which I understand is sort of preliminary approval—assuming it is approved, what does the Whitney Holding Company do? It then takes what? It takes $650,000 of its funds and it [46] another piece of paper filed in the Comptroller's office—wit: A charter for the Jefferson Bank—which will be its branch in Jefferson if you want to call it such, the branch on the west side of the river if it calls it such.

It again dips into the same funds—of course, it is then a "holding company." It is then in being. And it then exists in fact as well as in law, which it does not now.

I say it does not exist, in fact it does not exist in law as a holding company until you approve it, and Crescent doesn't exist until it has a permit, which it doesn't have. And I say you can't merger with yourself.

But if it is all accomplished, they dip in and create a Jefferson Parish bank or a Jefferson Parish bank and some branches in Jefferson Parish for operation with Whitney funds.

I say to you gentlemen, and I have said it publicly and I have included it in a communication, I don't think that this Board has ever approved such a legal maneuver and I don't think that it is within the realm, nor was it contemplated by the acts of Congress that this type of legal maneuver should be permitted and sanctioned by this Board, to do what? To permit Whitney National Bank to do indirectly that which legally they cannot do directly. And I don't think that you gentlemen should lend yourselves to permit them to do indirectly that which the law directly prohibits them from doing.

I say, gentlemen, that this application, if it is [47] analyzed carefully and if the statute is analyzed carefully, and the purpose and meaning and intent of the Holding Company Act, that it is an invalid application and does not meet the requirement of the statute.

I thank you, gentlemen.

I will be happy to answer any question that you might like to ask me.

Chairman Martin: Does anybody want to ask a question of Mr. Sehrt?

Governor Mitchell: I would like to ask a question of both of these gentlemen, or a couple of questions.

If the right of cumulative voting were retained, would you oppose this plan or the Whitney to expand in the Jefferson Parish?

Mr. Roussel: I would like to answer your question on that, sir.

If you will put in that holding charter that they should have a sufficient amount of directors and they would have cumulative voting, I would be for it. Because the small minority stockholder would then have a chance to fight it. But if they remove cumulative voting—as you know, it is pretty hard fighting a bank of that kind. They have a guy selling a piece of land to their own directors and they tell you there is nothing wrong with that.

I know not one of you gentlemen—and I would be [48] willing to bet—would say a corporation should sell something to its own director. I know you wouldn't do that.

If that were put in there, if you would make them put in that holding company that they would have a fair number of directors for the size of the corporation it is, and cumulative voting, I will be for it—I will be for it.

Mr. Sehrt: Also, of course, you would not want them to permit a director to give his fellow director a proxy.

Mr. Roussel: That is another thing.

Mr. Sehrt: And you would not want a director—several directors—to give their proxy and the president have the privilege—I am not saying he will do it, but he will have the privilege of soliciting them and going and holding a meeting.

I am not saying I am for what Mr. Roussel just said. I will not be for it because I say it does not conform to the law. I will have to tell you that I would have to be consistent and say it does not conform to the law; they can't accomplish it in this way.

Governor Mitchell: I have one further question.

Chairman Martin: All right.

Governor Mitchell: Do either of you gentlemen own or, say, control associations or companies that own stock in other banks in New Orleans metropolitan area?

Mr. Roussel: Yes, sir, I do—not control; I don't [49] have absolute control of any bank.

Governor Mitchell: But you do own stock in other banks?

Mr. Roussel: I own stock in four other banks, sir.

Governor Mitchell: In the New Orleans metropolitan area?

Mr. Roussel: No, three in the metropolitan New Orleans area and one outside the metropolitan area.

Governor Mitchell: I see.

Mr. Sehrt: And, sir—

Governor Mitchell: And some of these banks are in Jefferson Parish?

Mr. Roussel: Yes, sir, one in Jefferson Parish, the Merchants Bank.

Mr. Sehrt: In answer to you, sir, I own no stock in any bank in Jefferson Parish.

I am a small stockholder in Whitney National Bank. I hold several hundred shares of stock in the National American Bank.

I do own some stock in a bank in St. Bernard Parish which is the other end of the metropolitan area, not in the direction—going down river.

Governor Mitchell: That is all I have.

Mr. Sehrt: I might add, because my opponents might feel I have failed to add it, my firm is attorney for the [50] down-river bank, the Peoples Bank and Trust Company. I am associated with the firm, Sehrt and Boyle. I am senior member of that board. And we are also attorneys for the National American Bank. I am a director for the National American Bank.

I wanted the record to be complete, sir.

Chairman Martin: Any other questions? (No response)

If not, thank you, Mr. Sehrt and Mr. Roussel.

Mr. Sehrt: Thank you.

Mr. Roussel: Thank you.

Chairman Martin: Now shall we go on to Mr. Passera before we give Mr. Berry and Mr. Monroe a chance to rebut?

Mr. O'Connell: Yes, sir.

Chairman Martin: Would you like to proceed, Mr. Passera?

Mr. Passera: If I may, sir.

Chairman Martin: Right.

ORAL STATEMENT OF VICTOR J. PASSERA, JR., PRESIDENT, THE NATIONAL BANK OF COMMERCE IN JEFFERSON PARISH.

Mr. Passera: If I may, I will stand. I am not going to take that much time.

My name is Victor J. Passera, Jr. I have the privilege

of being the President of the National Bank of Commerce in Jefferson Parish.

I sincerely appreciate, gentlemen and Mr. Chairman, the kindness of the honorable members of the Board to let me speak—and, Mr. Berry, I appreciate your courtesy.

My appearance, gentlemen, here today—first may I [51] say that I, of course, feel a little bit awed in the presence of such distinguished gentlemen. I must confess that.

My appearance today is motivated by my responsibilities to the shareholders of the National Bank of Commerce in Jefferson Parish, to the Directors, to the members of my staff; I'm also motivated by my own responsibilities to the office which I hold; and beyond that, in the public interest of the shareholders, the residents of the Jefferson Parish area who have interest in the other parish banks.

Our opposition to the holding company is primarily two-fold:

First, for the past two years, 1960 and 1961, the deposits and the earnings of the parish banks have not been appreciably great.

Secondly, we feel that there is perhaps a circumvention of Section 7 of Regulation Y.

We feel that at this particular moment, there is no need for additional new banking facilities within Jefferson Parish, specifically the east bank.

We also feel that such creation of new banking facilities would act as a deterrent on the growth of the existing banks as well as the earnings of the existing banks.

I sincerely appreciate your kindness.

Governor Balderston: Mr. Chairman, may I ask Mr. Passera a question?

[52] Mr. Passera: Surely.

Governor Balderston: In the communication on which you were one of the signers, you indicated that there is, and I quote, "no indication of development, either industrially or residentially, in the areas of the proposed bank and its branch."

Now, that statement seems to contradict something that Mr. Berry told us earlier.

Mr. Passera: At the time of the signing of that, sir, that was absolutely true.

The economy of Jefferson Parish has remained at a standstill and was at a standstill during the two years that I have mentioned—standstill in that sense of the word.

Surely there was growth in the parish, but not the astounding or astronomical growth the parish had experienced, the east bank specifically, prior to the year 1960.

At that time, the growth had been retarded, was retarded. Since that time there are, as Mr. Berry mentioned, several industries moving into the parish and probably will become existing after the first of the year.

Does that answer your question, sir?

Governor Balderson: Thank you.

Commissioner Martin: Does anyone else want to ask a question?

Governor King: I would like to ask one question.

[53] Mr. Passera: Yes, sir.

Governor Balderston: Recognizing the fact that your own institution and the proposed institution would be more or less arms of both large and strong organizations, would you really think that because one necessarily would happen to be in first, it should more or less pre-empt the territory for others that were strong and felt they could more or less subsidize to some extent a new institution which would give some additional competition, certainly—certainly it would affect the other banks in the area. But assuming that one fairly large and strong institution went in, would you really think it was fair to deny another entry? Recognizing the fact that they were both more or less arms of strong banks?

Mr. Passera: Mr. Governor, the answer to your question is obviously "no," sir; we have no pre-empting rights.

Chairman Martin: Are there any other questions of Mr. Passera? (No response)

Thank you, Mr. Passera.

Mr. Passera: Thank you, sir.

Chairman Martin: All right, we will give Mr. Monroe and Mr. Berry time for rebuttal.

Rebuttal Statement of Malcolm L. Monroe, Monroe & Lemann, New Orleans, Louisiana

Mr. Monroe: If I may take just a moment.

With respect to Mr. Roussel's statements, all but the items with respect to the charter that he referred to are matters governing the internal control of the Whitney Bank, all are [54] matters that have been fully taken up or disclosed or subject to examination by the Comptroller. The Comptroller's files have full reports. They are not within the

desires, as I understand it, of this Board to go into the matters of bank administration. And the Comptroller's examiners have been into every matter that has been discussed by him.

With respect to the charter, inasmuch as that is a matter that has been filed here and was filed here on September 1st, under cover of our letter, and is already in the record, I would like to read from my letter momentarily, briefly, transmitting that to Mr. Denmark, my letter of September 1st. I said, in transmitting the charter:

"As I explained in previous conferences with representatives of the Federal Reserve Bank and the Comptroller's office, this charter, of course, is the skeleton charter filed primarily for the purpose of the holding corporation's name. It is contemplated that upon basic organization meeting of the board of directors of the Whitney Holding Corporation, the real parties in interest will appear. The form of the charter is simply taken from the standard, recommended form of Louisiana charter and contains routine provisions."

It is a charter I drew myself. It is taken out of the form book prepared in the form suggested by Mr. Charles E. Bunbar, who is now deceased, the leading corporation attorney and professor at GLM Law School. That is where those provisions come from [55] that are represented to you as being so drastic by Mr. Roussel.

I have also said to your staff that if the Federal Reserve believes that any particular provision should be amended in order to be more in conformity with the policy of the Federal Reserve, I am sure this can be easily carried out.

I would say about the same proportion of Mr. Sehrt's remarks deal with matters that are under the jurisdiction of the Comptroller. The only matter that the Whitney Holding Corporation is before this Board for is the holding corporation's application to form the bank in Jefferson Parish.

As Mr. Berry has already so carefully pointed out, we would have proceeded with the complete reorganization of the Whitney into a holding company in Avoyelles Parish. We were advised it was completely legal by the attorneys of the Comptroller. But the Comptroller advised us that he did not want us to reorganize the bank in Avoyelles Parish unless we were assured of going forward with the meat of the program, which was moving into Jefferson

Parish, and therefore his approval has been conditional on the approval of this board to go into Jefferson Parish. However, the questions addressing themselves to the legality and the wisdom of reorganizing the Whitney in Orleans have been passed on and have been up before the Comptroller for more than 6 months and have been passed on by him and are within his jurisdiction.

We have handed you his approvals in the first two [56] exhibits we handed you this morning showing that he has approved this entire program as a banking program. And from his point of view, he has approved the organization of a bank in Jefferson Parish as a desirable banking feature.

I don't think I have anything more to say except the matter before you now is going into Jefferson Parish and certainly there have been many examples of applications to you for holding corporations to form banks in other areas. Naturally they take their own assets to form it.

We feel that one of the strengths; the large strength in our position is that we are forming a new bank and not absorbing an existing institution and thereby eliminating that competitor.

I would like to finally point out that our charter for the Crescent City Bank is executed, is on file with the Comptroller; it is a legal entity. The application to consolidate with the Whitney has been executed by both banks, both meetings, stockholder meetings, have been held and they have overwhelmingly approved it, and that is just ready for routine completion.

I would like this record, if I may, to stay open for the purpose of filing the final executed copy in the record as a routine matter of the charter of the Crescent City Bank.

Chairman Martin: Does anyone want to ask any questions?

(No response)

[57] Thank you very much.

Mr. Monroe: Thank you very much.

Chairman Martin: Tom, do you want to comment at this juncture?

Mr. O'Connell: Mr. Chairman, the Board has now received presentations by all persons who have requested the right to make the same and, in addition, has received Mr. Passera's statement.

Unless there are other matters by the Board, it would appear appropriate you might close the proceedings.

Chairman Martin: Do you want to make any further statement for the record or have you covered everything?

Mr. O'Connell: I believe I have covered everything that should be covered, Mr. Chairman.

Chairman Martin: Would anyone else, either Mr. Sehrt or Mr. Roussel, like to say anything further?

Mr. Roussel: No, thank you, sir.

Mr. Sehrt: No.

Chairman Martin: And you have nothing further, Mr. Berry?

Mr. Berry: No, thank you. I think we have taken enough of your time.

Chairman Martin: Thank you very much.

The meeting is adjourned.

(Whereupon, at 11:35 a.m., the oral presentation in the above-entitled matter was concluded.)

Filed June 20, 1962

EXHIBIT 5

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM
Washington 25, D. C.

Address Official Correspondence to the Board

May 3, 1962.

Comptroller of the Currency,
Treasury Department,
Washington 25, D. C.

Dear Sir:

The Board of Governors has today approved the application of Whitney Holding Corporation, New Orleans, Louisiana, for permission to become a bank holding company by acquiring the stock of Crescent City National Bank and Whitney National Bank in Jefferson Parish.

Enclosed are the Board's Order of this date, the accompanying Statement, and the press release on this action. Also enclosed are a Concurring Statement of Governor Mitchell and a Dissenting Statement of Governor Robertson.

Very truly yours,

MERRITT SHERMAN,
Secretary.

Enclosures

FEDERAL RESERVE

For immediate release May 3, 1962.

The Board of Governors of the Federal Reserve System today announced its approval of an application by Whitney Holding Corporation, New Orleans, Louisiana, for permission to become a bank holding company by acquiring substantially all of the stock of a bank that would continue the business of the existing Whitney National Bank of New Orleans, under that title, and substantially all of the stock of the Whitney National Bank in Jefferson Parish, Louisiana. The Whitney National Bank in Jefferson Parish is a new bank to be located in a part of the New Orleans metropolitan area lying immediately west of that city. Attached are copies of the Order and Statement of the Board, the Concurring Statement of Governor Mitchell, and the Dissenting Statement of Governor Robertson.

Attachments

UNITED STATES OF AMERICA

BEFORE THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

Washington, D. C.

In the Matter of the Application of: WHITNEY HOLDING CORPORATION for approval of its becoming a bank holding company by acquiring the stock of Crescent City National Bank, New Orleans, Louisiana, and Whitney National Bank in Jefferson Parish, Jefferson Parish, Louisiana.

ORDER APPROVING APPLICATION UNDER BANK HOLDING COMPANY ACT

There has come before the Board of Governors, pursuant to section 3(a)(1) of the Bank Holding Company Act of 1956 (12 USC 1842) and section 222.4(a)(1) of Federal Reserve Regulation Y (12 CFR 222.4(a)(1)), an application on behalf of Whitney Holding Corporation, New Orleans, Louisiana, for the Board's prior approval of action whereby Whitney Holding Corporation would become a bank holding company by acquiring substantially all of the vot-

ing stock of (1) the Crescent City National Bank, New Orleans, Louisiana (a proposed new bank), into which would be consolidated the existing Whitney National Bank of New Orleans, under the latter title, and (2) the Whitney National Bank in Jefferson Parish, Jefferson Parish, Louisiana (a proposed new bank). A Notice of Receipt of Application was published in the Federal Register on July 28, 1961 (26 Federal Register 6792), which provided an opportunity for submission of comments and views regarding the proposed acquisitions, and the time for filing such comments and views has expired and all comments and views filed with the Board have been considered by it. Pursuant to Order published in the Federal Register on December 23, 1961 (26 Federal Register 12312), a public proceeding with respect to the application was held before the Board on January 17, 1962 to provide a further opportunity for the expression of views and opinions by interested persons.

It Is Ordered, for the reasons set forth in the Board's Statement of this date, that said application be and hereby is granted, provided that the acquisitions approved herein shall not be consummated (a) sooner than seven calendar days after the date of this Order or (b) later than three months after said date, and provided further that Whitney National Bank in Jefferson Parish shall be opened for business within six months after said date.

Dated at Washington, D. C., this 3rd day of May, 1962.

By order of the Board of Governors.

Voting for this action: Chairman Martin, and Governors Balderston, Mills, Shepardson, King, and Mitchell.
Voting against this action: Governor Robertson.

(Signed) Merritt Sherman,
Secretary.

(Seal)

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

APPLICATION BY WHITNEY HOLDING CORPORATION FOR PERMISSION TO BECOME A BANK HOLDING COMPANY

STATEMENT

Whitney Holding Corporation, New Orleans, Louisiana ("Applicant"), has applied to the Board of Governors, pursuant to section 3(a)(1) of the Bank Holding Company Act of 1956 (the "Act") for approval of action that would cause it to become a bank holding company under the Act, namely, its acquisition of all of the stock of Whitney National Bank of New Orleans ("Whitney New Orleans")* and all of the stock of Whitney National Bank in Jefferson Parish, Louisiana ("Whitney Jefferson").

Whitney New Orleans is by far the largest banking institution in the City of New Orleans and the State of Louisiana, and is one of the largest banks in the South. New Orleans, with a population of 627,525 according to the 1960 census, is a major seaport and financial and industrial center.

Whitney Jefferson is a new bank, organized by Applicant, and has not yet commenced operations. It is to be located in an area known as the East Bank of Jefferson Parish ("East Bank"), which adjoins the City of New Orleans on the west.

Under the law of Louisiana, a bank may not establish branches outside of the parish in which its head office is situated. (A Louisiana "parish" is comparable to a "county" in other States.) The boundaries of Orleans Parish are coterminous with the boundaries of the City of New Orleans, and consequently banks situated in New Orleans (including national banks) may not establish branches beyond the city limits.

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* The application refers to "Crescent City National Bank" rather than to "Whitney National Bank of New Orleans". However, Crescent City National Bank is only the temporary title of a bank that will continue the business of the present Whitney National Bank of New Orleans under the latter title. For the sake of clarity, this statement refers to Whitney National Bank of New Orleans and disregards the temporary title "Crescent City National Bank".

Like many other large American cities, the City of New Orleans has become the central portion of a metropolitan area that extends far beyond the municipal boundaries. A large part of the expansion of population and business in New Orleans metropolitan area has taken place in Jefferson Parish, which adjoins the city on the west and south, as well as into St. Bernard Parish, which lies to the east. The West Bank area of Jefferson Parish is separated from most of New Orleans by the Mississippi River, but the East Bank area (in which Whitney Jefferson is to be situated) is not physically separated from New Orleans, but forms a continuous and homogeneous westward extension of that city.

Views and recommendations of the Comptroller of the Currency.—In accordance with the requirement of section 3(b) of the Act, the Comptroller of the Currency was asked to submit his views and recommendations with respect to the pending application. In a letter dated October 11, 1961, Comptroller of the Currency Ray M. Gidney recommended approval.

Statutory factors.—Section 3(c) of the Act requires the Board to take into consideration the following five factors:

(1) the financial history and condition of the holding company and banks concerned; (2) their prospects; (3) the character of their management; (4) the convenience, need, and welfare of the communities and the area concerned; and (5) whether or not the effect of the acquisitions would be to expand the size or extent of the bank holding company system involved beyond limits consistent with adequate and sound banking, the public interest, and the preservation of competition in the field of banking.

Discussion: The stated purpose of the proposed holding company system is to enable an organization centered about Whitney New Orleans to provide banking services not only through its existing 12 offices within the City of New Orleans but also through offices in the East Bank of Jefferson Parish. The holding company system will be under the direction of the present executive management of Whitney New Orleans; in fact, for present purposes the holding company itself is simply the means by which Whitney banking offices may be established and operated in East Bank. Consequently, the character of the management and the pros-

pects of the Applicant and its two proposed subsidiary banks may be evaluated largely on the basis of the financial history and condition, character of management, and prospects of Whitney New Orleans.

The financial history of Whitney New Orleans has been satisfactory. The condition of that bank is sound and its management is regarded as satisfactory. Accordingly, it is believed that the management of Applicant and Whitney Jefferson will be satisfactory and the prospects of the holding company, which depend principally upon the prospects of Whitney New Orleans, are favorable.

To the extent that the prospects of Whitney Jefferson depend upon the quality of its management, those prospects also are favorable, since Whitney Jefferson will be subject to general policy direction by Applicant, and Applicant may be expected to provide competent local management for Whitney Jefferson. However, the prospects of Whitney Jefferson, as a separate banking institution, also depend, to a large degree, on the extent to which it can attract deposits, make profitable loans and investments, and otherwise conduct its business safely and profitably.

In the decade 1950-1960, while the population of the City of New Orleans increased 10 per cent (from 570,000 to 628,000), the population of the East Bank of Jefferson Parish increased 128 per cent (from 60,000 to 137,000). Although there can be no assurance of the continuance of this exceptionally rapid rate of growth, the geographical situation in the New Orleans area is such as to create a substantial likelihood of considerable further growth in East Bank. In addition, it is important to note that Whitney New Orleans presently holds deposits of individuals, partnerships, and corporations, emanating from East Bank, in an aggregate amount exceeding 30 per cent of such deposits held by all banks having their head offices in East Bank. It is reasonable to anticipate that a substantial portion of East Bank deposits in Whitney New Orleans will be transferred to Whitney Jefferson when it opens for business. Because of this circumstance, as well as the relationship that would exist between Whitney Jefferson and Whitney New Orleans, it is concluded that the prospects of the former, from this viewpoint also, are favorable, despite the increase in recent years in the number of banking offices situated in East Bank.

If the proposed holding company system is created, Whitney New Orleans will continue to render, through its 12

offices in the city, banking services of the scope and character presently rendered by it. Accordingly, consummation of the proposal will not affect the convenience, needs, or welfare of the New Orleans area, as far as the future operations of Whitney New Orleans are concerned.

Whitney Jefferson, however, will be a new banking institution, and therefore its establishment necessarily will affect the convenience, needs, and welfare of the communities and the area it will serve.

The proposed head office of Whitney Jefferson will be situated approximately one mile from the nearest competing banking office. Its establishment and operation, therefore, will serve the convenience of residents and business establishments in its immediate neighborhood, and will also provide a readily available alternative source of banking services to residents and business establishments in a wider area. At present, only two banks serve the area within four road miles of the proposed head office location of Whitney Jefferson. Both of these are well-established institutions, and the entry of Whitney Jefferson, in addition to the added convenience, may also contribute to the welfare of the area by strengthening local banking competition with resulting improvement in the scope and quality of services rendered by each of the competing institutions.

In addition to its head office, Whitney Jefferson has applied to the Comptroller of the Currency for authority to establish a branch in the Airline Parl Shopping Center, about three and one-half miles northwest of its head office; the latter would be located near the Mississippi River in a more industrialized section of East Bank. The branch application is pending before the Comptroller of the Currency, who has not, as yet, either approved or disapproved the proposed branch establishment.

On March 1, 1962 the new Metropolitan Bank of Jefferson opened for business in the Airline Park Shopping Center, which would also be the location of the proposed branch of Whitney Jefferson. Any immediate contribution by such branch of Whitney Jefferson to the convenience, needs, and welfare of the area necessarily is considerably lessened by the fact that the area is already served by a banking institution. In addition, there may be some question as to whether adequate and sound banking, as well as the public interest generally, would be promoted by establishment, in

the Airline Park Shopping Center, of a banking office affiliated with the largest bank in Louisiana, so soon after the opening there of a new independent bank. However, the unfavorable significance of this factor is somewhat lessened by the rapid growth of the East Bank area, which suggests a greater than usual likelihood that two new banking offices in the same area might achieve, within a reasonable time, a scale of business that would permit both to operate soundly and profitably.

It is also significant that the Comptroller of the Currency has held the branch application in abeyance since before the establishment of the new Metropolitan Bank of Jefferson. Primary responsibility for deciding whether establishment of the branch would be in the public interest lies with the Comptroller, and it seems reasonable to assume that the branch will not be authorized if its presence would threaten the sound and serviceable operation of the newly-established bank in the Shopping Center.

Perhaps even more important than service rendered to new customers, from the viewpoint of convenience and welfare, is the service that Whitney Jefferson could render to individuals and business organizations in East Bank that already are customers of Whitney New Orleans. As mentioned, Whitney New Orleans, through its offices in the city, draws a substantial amount of deposits from East Bank. Since Whitney New Orleans draws this business despite the lesser convenience, for customers in East Bank, of dealing with a banking office in New Orleans rather than one in East Bank itself, it may be inferred that doing business with Whitney offers to its customers in East Bank benefits that are sufficient, in their judgment, to outweigh the lesser convenience.

Although some of Whitney New Orleans' East Bank business may remain with that institution, it is almost certain that a substantial part will be transferred to the affiliated Whitney Jefferson. Whitney customers in East Bank, therefore, will benefit from the convenience of doing business at a local office that can furnish, more conveniently than at present, the services that originally gained this business for the Whitney organization. Whatever special characteristics of Whitney service drew a considerable volume of East Bank business to Whitney offices in New Orleans will now become available not only to existing Whitney

customers but to others in East Bank who have not heretofore found it convenient or feasible to deal with Whitney New Orleans.

In this aspect, the pending proposal to establish banking facilities in East Bank through the holding company device is due to the natural and legitimate desire of a bank in an expanding metropolitan area to furnish its services more conveniently to customers situated in a section that, although outside the corporate limits of Orleans Parish, is realistically an integral part of the metropolitan economy. The laws of Louisiana do not prohibit expansion of a banking organization by this means. In the judgment of the Board, this phase of the proposal is a proper expression of the character of the American business system—in some respects, in fact, it is a matter of economic self-defense—and ought not to be frustrated unless it involves effects significantly detrimental to the public interest.

Under section 3(c)(5) of the Act, the question arises whether Applicant's acquisition of the stock of Whitney New Orleans and Whitney Jefferson would expand the size or extent of the proposed holding company system beyond limits consistent with adequate and sound banking, the public interest, and the preservation of competition. Mention has been made of the possible effect of the establishment of the proposed branch of Whitney Jefferson upon adequate and sound banking in its immediate vicinity. Apart from this aspect, it appears that the proposal would add a sound and serviceable institution to the financial organizations situated in East Bank.

From the viewpoint of concentration of banking facilities, the significance of establishment of the proposed holding company system might seem at first blush to be relatively slight. On June 30, 1961 Whitney New Orleans held 39 per cent of total deposits of banks in New Orleans and 44 per cent of all deposits of individuals, partnerships, and corporations. The establishment of the holding company system would not increase Whitney New Orleans' proportion of the city banks' deposits; in fact, the anticipated transfer of some accounts from Whitney New Orleans to Whitney Jefferson would slightly reduce the percentages held by Whitney New Orleans. Initially, the deposit business of Whitney Jefferson may consist largely of such accounts transferred from the affiliated city bank, and it does not appear probable that the predominance of Whitney

banks in the New Orleans metropolitan area will be immediately increased as a result of the instant proposal.

However, the fact that a relatively high proportion of banking resources in the New Orleans metropolitan area is already concentrated in Whitney New Orleans does not demonstrate the propriety of an equal degree of concentration in a holding company system. It has been pointed out that "the Act relates to concentration of banking power, not in the hands of banks, but in the hands of bank holding companies." *Matter of First New York Corporation* (1958) 44 Federal Reserve Bulletin 902, 913-14.

It does not appear to the Board, however, that the degree of concentration of banking resources in the proposed holding company system would be such as to jeopardize the vigor of banking competition either in the City of New Orleans or in East Bank. The management and policies of the holding company system, it appears, would be equivalent to those of Whitney New Orleans. On the record before the Board, it appears that a comparable degree of concentration in that bank has not adversely affected the local competitive situation. In this connection, it is to be noted that there appears to be no trend toward increasing dominance of Whitney in the area; Whitney's share of the total deposits of the metropolitan area diminished from 38 per cent to 35.4 per cent between 1956 and 1961.

Some cases presented to the Board under the Act involve a proposal for holding company acquisition of control of banks that compete with each other. These situations necessarily involve the elimination of some banking competition. No such problem is presented by the pending application. The only existing bank involved is Whitney New Orleans. Consummation of the plan will bring into existence a new banking institution, Whitney Jefferson, which will be an additional competitor in the banking situation in the western sector of the New Orleans metropolitan area. By thus offering the banking public of that district one more alternative source of banking services, the proposal would tend to increase the vigor of competition. Apart from the possible adverse competitive effect of the proposed branch of Whitney Jefferson, previously mentioned, there is no reason to believe that the increased competition would be destructive rather than beneficial.

It is especially noted that East Bank is already served by several offices of a bank that is affiliated with Whitney

New Orleans' largest competitor. Establishment of Whitney Jefferson, therefore, will introduce into East Bank a new and possibly important sort of competition—that is, competition between local banks affiliated with large banks in the nearby city and consequently in a position to offer the special services that may be available as a result of such affiliation.

Viewing the relevant facts in the light of the general purposes of the Act and the factors enumerated in section 3(c), it is the judgment of the Board that the proposed acquisitions would be consistent with the statutory objectives and the public interest and that the application should be granted.

May 3, 1962

CONCURRING STATEMENT OF GOVERNOR MITCHELL

In my judgment, there are two issues of concern in this case.

The first issue is whether an increase in concentration would come about from approving the application. Whitney presently accounts for about 35 per cent of New Orleans metropolitan area deposits. Whitney's present position is a *fait accompli*: No matter how Whitney Holding Corporation divides its deposit share among the banks it may create, its present share will not be changed. The Whitney organization would *still* have 35 per cent of area deposits even if it were to create and operate a score of banks. This is because the plan of the application does not include purchasing other banks but rather intends de novo facilities to be established in East Bank. Thus, approval of this action will not increase concentration by any meaningful measure whether deposits, loans, assets, or offices are used. Whitney has what it has.

Will "concentration" increase in the future? If Whitney can convince *increasing* numbers of individual and corporate depositors and loan applicants to bank with its new set of offices because it offers better services and more attractive rates, then we might expect its share of deposits and loans to increase. Denying this application on grounds of containing an anticipated increase in "concentration" of this sort would be denying one of the very things this Board is directed to preserve, competition.

The second issue is whether approval of this application would produce an "overbanked" situation in the East Bank of Jefferson Parish.

The use of "overbanking" as a policy criterion may have been justified in a time when the creation of banks was imperfectly regulated and deposits uninsured. The obsolescence of this concept is apparent in today's context of widespread deposit insurance and regulation of entry by State and Federal agencies based on responsible management and adequate capital. To impose *further* restrictions on entry by deciding, ad hoc, that a given area may become "overbanked" if another competitor is admitted is to preserve comfortable closed markets for established institutions. Decisions with this effect can only be hostile to the public interest.

Since this Board does not possess perfect foresight, it

must depend on some rough and general rules of thumb if it is to avoid decisions harmful to the public interest. The fact that the "overbanked" community of today may be the "underbanked" community of tomorrow if the growth of the community is rapid and substantial suggests that such rules of thumb might be formulated in terms of trends in population, in business expansion, and in deposits. Strong upward movements in these indicia would shortly undo any initial condition of "too many" banks.

What can be said in terms of these rules of thumb in the present case? The population of Jefferson Parish has more than doubled since 1950. The Federal Reserve Bank of Atlanta reports that further residential growth in the area is assured. Rising business activity in the East Bank area reflects a growing industrial community. Reserve Board data on deposits of individuals, partnerships, and corporations show that deposits increased by more than 300 per cent and deposits per capita in Jefferson Parish have increased by more than 100 per cent in the past decade, outstripping any other urban parish in the State. The average *annual* rate of deposit growth of First National Bank of Jefferson Parish, of Gretna, was 10 per cent over the 10-year period 1951-61. Merchants Trust and Savings Bank of Kenner has averaged 25 per cent and Metairie Savings Bank and Trust Company 12 per cent over the same period. National Bank of Commerce in Jefferson Parish has averaged 7 per cent in its six years of operation. Taken together, these data indicate that an "overbanked situation" could not exist for long in Jefferson Parish.

Approval of this application will strengthen competition by allowing a New Orleans banking organization to operate through de novo facilities in the rapidly growing East Bank of Jefferson Parish. Rejection of the application would preserve sanctuary for existing Jefferson Parish banks or lead to indirect entry by Whitney through a device with less competitive impact.

May 3, 1962

DISSENTING STATEMENT OF GOVERNOR ROBERTSON

Whitney National Bank of New Orleans is the largest banking institution of the City of New Orleans and the State of Louisiana. It controls in the neighborhood of 40 per cent of the deposit and loan business of all New Orleans banks—more than the second and third largest banks combined. The proposal before the Board of Governors would place control of this bank in Whitney Holding Corporation and thereby would overcome the effect of the branch banking laws of Louisiana, which prevent Whitney from establishing any offices outside of Orleans Parish (the City of New Orleans). In other words, by this means the Whitney banking organization would escape the legal limitations that now permit it to have offices only within the City of New Orleans.

In my judgment, one of the basic purposes of the Bank Holding Company Act—to prevent undue concentration of banking power in holding companies—would be unjustifiably defeated by approval of the creation of a holding company system to control the predominant bank of a major metropolitan area and additional banks within that area, *unless* such approval is warranted by favorable factors that outweigh this strong adverse consideration.

No such substantial favorable factors have been established in this case. It can hardly be asserted that the East Bank of Jefferson Parish would lack adequate banking facilities unless Whitney Holding Corporation is permitted to establish and control the proposed Whitney National Bank in Jefferson Parish. New banks and branches are being established in East Bank at a quite rapid rate, and the neighborhoods in which Whitney Jefferson would have its offices already have banking facilities conveniently available.

The establishment of additional banks and branches always contributes, in some measure, to the convenience of the banking public, and also, in many cases, to the vigor of banking competition. Ordinarily, therefore, establishment of additional banking facilities is beneficial from these viewpoints. In this case, however, banking offices affiliated with the largest financial institution in the area would be competing with small local banks, including a bank that opened for business only two months ago in the same shopping center in which it is proposed to locate one of the

offices of Whitney Jefferson. The effect of the entry of Whitney Jefferson at this time could be significantly detrimental to this new bank and to another small bank with which Whitney Jefferson would directly compete. In view of the specific responsibilities placed upon the Board of Governors by section 3 of the Bank Holding Company Act, it is questionable whether the Board may properly disregard this possibility of destructive competition on the ground that, if such a danger exists, another supervisory authority may refuse to authorize Whitney Jefferson to establish the office in question.

One other aspect of the Whitney Holding Corporation plan must be taken into account in view of section 3(c) of the Act, which requires the Board to consider the effect of proposed transactions on the public interest. To enable minority stockholder interests to have a voice in the direction of national banks, section 5144 of the United States Revised Statutes, as amended by the Banking Act of 1933 (12 U. S. Code 61), provides for cumulative voting in the election of directors of national banks—that is, each shareholder has "the right to vote the number of shares owned by him for as many persons as there are directors to be elected, or to cumulate such shares and give one candidate as many votes as the number of directors multiplied by the number of his shares shall equal, or to distribute them on the same principle among as many candidates as he shall think fit".

In order to eliminate minority stockholders of Whitney National Bank of New Orleans and thereby to insure that Whitney Holding Corporation will be able to elect all members of the bank's board of directors, the plan before the Board includes a so-called "phantom bank" merger, which makes it impossible for a stockholder of the bank to retain his stock interest therein. The purpose of centralizing control of the holding company and its banks in the hands of very few individuals—perhaps only one individual—is apparent from other features of the proposal. Not only would the privilege of cumulative voting be denied to minority stockholders of Whitney Holding Corporation, but its Articles of Incorporation provide that its board may consist of as few as three directors. Furthermore, the Articles would permit a director, absent from a meeting, to authorize another director to "cast the vote of the absent director, according to written instructions, general

or special. . . ." The statutes of Louisiana permit the use of such directors' proxies. Absent such statutory authorization, which is unusual if not absolutely unique, the courts uniformly have held that directors' responsibilities may not lawfully be discharged by giving proxies in lieu of attending directors' meetings. The basic duty of directors is to direct the policies of the corporation. To perform this duty, directors should attend meetings, participate in discussion, and vote in accordance with convictions arrived at after full and free interchange of ideas.

In brief, the plan before the Board seems designed to minimize the participation of stockholders, and even of directors, in the control and management of the holding company and its subsidiary banks. This appears to be the common objective of (1) eliminating minority interests in subsidiary banks (where they would enjoy the cumulative voting privilege), (2) the absence of cumulative voting in the bank holding company, (3) the provision for a board of directors that may consist of only three members, and (4) the almost unprecedented provision for use of proxies at directors' meetings. Taken together, these features of the proposal reflect an arrangement by which power to direct and control the holding company system, including its banks, could be concentrated in the hands of a single individual. In my judgment, such an undemocratic arrangement is particularly inappropriate in a system that is to consist of national banks, when it is considered that none of the three latter features is permissible under the National Bank Act and related Federal statutes. It should not receive this Board's stamp of approval.

The proposal before the Board would promote banking convenience in the East Bank section of metropolitan New Orleans to a moderate degree. It would also, however, provide a vehicle for enhancing the existing high degree of banking concentration in the area and would permit a centralization of banking power of major proportions in individual hands, to a degree that, to my knowledge, is without parallel in the American banking system. For these reasons, I conclude that the creation of the proposed holding company system would be contrary to the public interest and therefore should be denied.

May 3, 1962.

DEFENDANT'S EXHIBIT 6

WHITNEY NATIONAL BANK OF NEW ORLEANS

October 27, 1961

Keehn W. Berry
President

TO WHITNEY NATIONAL BANK SHAREHOLDERS:

REORGANIZATION PROGRAM

Under date of July 17, 1961, I explained to you that we had been working for some time to obtain the necessary approval of the Comptroller of the Currency and the Federal Reserve Board to the steps required to create a Holding Company into which the stock of the Whitney National Bank would be converted and that we then contemplated moving funds from the Whitney National Bank of New Orleans into the Holding Company for the establishment of a Whitney National Bank in Jefferson Parish.

We now have the concurrence of the Comptroller of the Currency to the establishment of a Crescent City National Bank with a capital of $280,000 and a surplus of $56,000 and paid in undivided profits of $14,000, or a total capitalization of the Crescent City National Bank of $350,000. The steps needed to consummate the change in our capital structure will be as follows:

1. We propose to put $350,000 of the capital funds of the Whitney National Bank in a Lousiana business corporation under the title—"WHITNEY HOLDING CORPORATION". The Whitney Holding Corporation will have an authorized capital of 1,120,000 shares of no par value stock. 5,600 of these shares will be issued to the Whitney National Bank of New Orleans for the $350,000. The Bank will immediately distribute these shares to all of its shareholders on the basis of 1/20th of one share for each share of the 112,000 shares of the Whitney National Bank stock outstanding.
2. The Whitney Holding Corporation will cause the organization of the Crescent City National Bank contributing $280,000 to capital, $56,000 to surplus, and $14,000 to undivided profits, and Whitney Holding Cor-

poration will receive for that all of the authorized stock of Crescent City National Bank, being 112,000 shares of $2.50 par value.

3. Crescent City National Bank will enter into a consolidation agreement with the Whitney National Bank of New Orleans. Whitney Holding Corporation will execute an agreement which will be a part of the consolidation agreement. The consolidation agreement will provide for consolidation under national banking law as follows:

   a. All o the stock of the Crescent City National Bank will be retained by Whitney Holding Corporation except qualifying shares which will be sold to directors for cash.

   b. Whitney National Bank shareholders will surrender all shares which will be cancelled and they will receive 9-19 20 shares of Whitney Holding Corporation for each share held. These shares, together with the dividend described in Section 1 above, will give each present Whitney shareholder ten shares of Whitney Holding Corporation stock for each share of Whitney Bank stock now held.

   c. All assets and liabilities of Whitney National Bank of New Orleans will be consolidated into the Crescent City National Bank under the Charter of the Crescent City National Bank and under the name of the Whitney National Bank of New Orleans. The par value of the stock of Crescent City National Bank will be simultaneously increased to $25.00 per share so that the capital structure of the new bank will be the same as that of the old.

   d. Dissenting shareholders of the Whitney National Bank of New Orleans will be entitled to a cash payment of the appraised value of the shares as provided by Federal Bank Law. In accordance with the same law, shares of Whitney Holding Corporation representing dissenting shareholders will be sold at public auction and the proceeds returned to the capital funds of Crescent City National Bank to the extent of funds used to pay the dissenting shareholders.

4. Upon appropriate notice and publication, the consolidation agreement will be submitted for approval by the shareholders of Whitney National Bank of New Orleans and shall become effective only upon the affirmative vote of not less than 2/3rds of the outstanding stock.
5. Upon completion of the consolidation Whitney Holding Corporation will own all of the stock, except directors qualifying shares, of the Crescent City National Bank (to be named Whitney National Bank of New Orleans). The outstanding shares of Whitney Holding Corporation will be 1,120,000 shares owned by all of the present Whitney Bank stockholders proportionately, except for dissenting shareholders.
6. The Crescent City National Bank (to be named Whitney National Bank of New Orleans) will provide $650,000.00 to Whitney Holding Corporation with which Whitney Holding Corporation will cause to be created the Whitney National Bank in Jefferson Parish, receiving all stock therefor, being 20,000 shares having a $25.00 par value. The initial capital structure will be $500,000 capital, $100,000 surplus, and $50,000 undivided profits. Whitney Holding Corporation will immediately sell to directors qualifying shares for cash.
7. The Whitney Holding Corporation will register under and operate in accordance with the Bank Holding Company Act of 1956 and other applicable laws, under which it can acquire no additional banks without approval of the Board of Governors of the Federal Reserve. There are no present plans for additional acquisitions.

Insofar as the operation in New Orleans is concerned, this program is simply a corporate reorganization of the present Whitney National Bank of New Orleans. It contemplates no changes in personnel, management, or directorship. It contemplates no changes in the facilities of the bank in New Orleans. It contemplates no changes in the ownership or proportional shareholdings.

The basic purpose of the program is to allow the Whitney organization in New Orleans to commence a Holding Company operation controlling a bank in East Jefferson Parish to protect Whitney's competitive position in that area into which many of Whitney's present customers have moved.

This detailed outline of the main features of the consolida-

tion program is sent to you in accordance with the prescribed procedure in the regulations of the Comptroller of the Currency.

Sincerely,

K. W. BERRY

Filed June 21, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

BANK OF NEW ORLEANS & TRUST COMPANY, ET AL.,

versus

COMPTROLLER OF THE CURRENCY

AFFIDAVIT IN SUPPORT OF DEFENDANT

STATE OF LOUISIANA,
Parish of Orleans.

Before Me, the undersigned authority, personally came and appeared: JAMES J. GILLY, who, being duly sworn, deposes and says:

(1) I am a resident of the City of New Orleans and President of the Whitney National Bank in Jefferson Parish. This affidavit is made to support any pleadings in opposition to the application of the plantiff in this proceeding and particularly in opposition to a request for a preliminary injunction.

(2) Whitney National Bank in Jefferson Parish in good faith has completed all legal requirements of incorporation, is legally in existence, and has gone to substantial expense in preparing to open for business. Its directors and officers are qualified; its clerks and tellers have been designated and appointed; premises have been purchased for the location of the permanent bank and arrangements are being made for the improvement of the premises; temporary premises in the same location have been leased; forms, checks, books and stationery have been printed, as evidenced by exhibits attached hereto (marked Exhibit "A"); the public has been notified that it will open for business momentarily.

(3) The executive vice president, the remaining executive

officers except the President, and the entire staff of the Whitney National Bank in Jefferson Parish will be separate, apart, and distinct from the Whitney National Bank of New Orleans, and the Board of Directors of said bank is different and will operate as a separate, independent organization.

(4) Guaranty Bank & Trust Company of Lafayette serves a community separated from Jefferson Parish by the parishes (counties) of St. Charles, Lafourche, Assumption, and St. Mary, and in no way can be considered as serving the area that is served by Jefferson Parish.

(5) Testimony taken subject to cross-examination in the litigation of *Louis J. Roussel* v. *Whitney National Bank of New Orleans*, No. 394-584 of the Civil District Court for the Parish of Orleans, in which judgment was rendered on October 26, 1961, declaring Louis J. Roussel to be a competitor of the Whitney National Bank of New Orleans through his interest in the National American Bank in New Orleans, together with testimony by Louis J. Roussel before the Board of Governors of the Federal Reserve System in the matter of the application of Whitney Holding Corporation on January 17, 1962, affirmatively establish that Louis J. Roussel has a practical working control of the Merchants Trust and Savings Bank of Kenner, plaintiff herein, through the ownership of 40 per cent. of the outstanding capital stock of that bank and a practical working control of the National American Bank of New Orleans through the control of approximately 37 per cent. of the outstanding capital stock. (See statement of condition of Merchants Trust and Savings Bank of Kenner attached hereto and marked Exhibit "B".)

(6) National Bank of Commerce in New Orleans operates an affiliate in Jefferson Parish under substantially identical name of National Bank of Commerce in Jefferson Parish. (See statement of condition attached hereto and marked Exhibit "C".) The National Bank of Commerce is represented in extremely important proceedings by Messrs. A. J. Waechter and George Denegre, partners in the firm of Jones, Walker, Waechter, Poitevent, Carrere & Denegre. (See Motion to Dismiss in the case of *Orleans Parish School Board, et al.* vs. *Whitney National Bank of New Orleans, et al.* U.S.D.C. E.D.La., C.A. No. 10,623, copy of which is attached hereto and marked Exhibit "D".) Messrs. George Denegre and A. J. Waechter are both direc-

tors of the Bank of New Orleans. (See statement of condition attached hereto and marked Exhibit "E." See also Martindale-Hubbell card, Exhibit "F".)

(7) The preliminary injunction requested herein restraining the Comptroller of the Currency from delivering a certificate to the Whitney National Bank in Jefferson Parish authorizing it to commence business will cause irreparable injury to said bank.

JAMES J. GILLY

Sworn to and subscribed before me, this 16 day of June, 1962.

BARTHOLOMEW P. SULLIVAN, JR.
Notary Public.

INTERVENING DEFENDANT EXHIBIT A

(3)

Form C.L. No. 1
Revised January, 1959

Standard Form Real Estate Board of New Orleans, Inc.

Lease of Commercial Property (Gross)

Parties This lease is made between Willis J. Porrin (hereinafter called Lessor) hereby leases to Lee Fellman & Co. Agents (the obligations of all Lessees being in solido) (hereinafter called Lessee), the following described premises:

Premises the front and masonry building known as No. 4407 Jefferson Highway between the rear line from Central Avenue and Norman Street, Jefferson, La

Term This lease is for the term of twelve (12) months commencing on the 15th day of June Nineteen Hundred and sixty-two and ending on the 14th day of June Nineteen Hundred and sixty-three

Rent This lease is made for and in consideration of a monthly each rental of One Hundred Thirty-five and 00/100 ($135.00) dollars payable monthly in advance

Place of Payment The first payment shall be due on June 15th, 1962 to: Willis J. Porrin at 4411 Jefferson Highway. The succeeding payments shall be due on the first day of each and every succeeding month at 4411 Jefferson Hwy Lessor may from time to time designate other places for the payment of the rent by written notice to Lessee.

Use of Premises The premises herein leased are to be used only for the following purposes:—

for commercial purposes

Lessee is obligated not to use the premises for any purpose that is unlawful or that tends to injure or depreciate the property.

Condition and Maintenance The within leased premises and appurtenances, including the locks, keys, plumbing, and glass, elevator, and heating system, if any, and all other fixtures, are accepted by the Lessee in their present condition, except for such repairs and improvements as are written into this lease. The Lessee agrees to keep them in the same order as received during the term of this lease and no repairs shall be due Lessee except such as may be especially noted herein or needed to the roof or rendered necessary by fire or other casualty; to pay all bills for water, including water sprinkler service charge, light, gas and other service, and to comply at the Lessee's expense with all ordinances and laws, now existing or to be enacted, and at the termination of this lease to leave the premises broom clean and free from trash, and in like good

FOR EXCLUSIVE USE OF REALTORS

On this _____ day of _____ 19____, before me, the undersigned authority, personally came and appeared _____ resident of _____, who declared and acknowledged to me that he executed the foregoing instrument and signed the same for the purpose and objects therein expressed, acting in the capacity of _____, and by order of the Board of Directors, of _____.

IN TESTIMONY WHEREOF, I have set my hand and seal in the City of _____ State of _____

My commission expires _____

_____
Notary Public.

Assignment For value received I/we hereby assign all my/our rights, title and interest in and to the within lease unto _____, his heirs, successors or assigns, with full subrogation.

_____
Lessor

Witnesses:

_____

_____

Standard Form
Real Estate Board of New Orleans, Inc.

LEASE OF
COMMERCIAL PROPERTY
(Gross)

From

To

Promises

Rent

Expiration

FOR EXCLUSIVE USE OF "REALTORS"

122

on the 25th day of June Nineteen Hundred and Sixty-two

and ending on the 24th day of June Nineteen Hundred and sixty-three

Rent This lease is made for and in consideration of a monthly each rental of One Hundred Thirty-five and 00/100 ($135.00) dollars

payable monthly in advance

Place of Payment The first payment shall be due on June 25th, 1962 to: Willis J. Perrin at 1411 Jefferson Highway. The succeeding payments shall be due on the first day of each and every succeeding month to: 1411 Jefferson Hwy Lessor may from time to time designate other places for the payment of the rent by written notice to Lessee.

Use of Premises The premises herein leased are to be used only for the following purposes:—

for commercial purposes

Lessee is obligated not to use the premises for any purpose that is unlawful or that tends to injure or depreciate the property.

Condition and Maintenance The within leased premises and appurtenances, including the locks, keys, plumbing, and glass, elevator, and heating system, if any, and all other fixtures, are accepted by the Lessee in their present condition, except for such repairs and improvements as are written into this lease. The Lessee agrees to keep them in the same order as received during the term of this lease and no repairs shall be due Lessee except such as may be especially noted herein or needed to the roof or rendered necessary by fire or other casualty; to pay all bills for water, including water sprinkler service charge, light, gas and other service, and to comply at the Lessee's expense with all ordinances and laws, now existing or to be enacted, and at the termination or cancellation of this lease to return the premises broom clean and free from trash, and in like good order as received by actual delivery of the keys to Lessor or Agent, the usual decay, wear and tear excepted.

If there are any elevators, lifts, machinery, glass or plate glass on premises, the care, maintenance and repairs of same are assumed by Lessee, together with all liability or claims for damages, and Lessee shall maintain liability insurance to the extent of _____ and plate glass insurance as an additional safeguard.

If there are any switchtracks serving the leased property, the care, maintenance, repairs and franchise charges, if any, are to be assumed by _____.

Lessee assumes the maintenance of the plumbing, including fixtures, outlets and drains, and the protection and repair of said plumbing, etc., even when injured by freeze.

Delayed Possession Should Lessee be unable to obtain possession on date of beginning of lease because of delays of tenants, or if a building is to be constructed and workmen or contractors have not brought building to condition permitting occupancy, or should there be any other delay in granting possession, not caused by the personal fault and design of Lessor, this lease shall not be affected thereby, and Lessee shall not be entitled to any damages beyond the remission of rent for such term during which he is deprived of possession.

Improvements Should Lessor agree to make improvements to premises, Lessee agrees, if Lessor deems it impossible or impracticable to make improvements agreed upon before possession is given, that Lessor may begin the work on the improvements after Lessee is duly installed in the property, and there shall be no reduction or waiver of any part of the rent because of this work.

Lessee is obligated not to make any additions or alterations whatever to the premises without written permission. All additions, alterations or improvements made by Lessee with or without consent of Lessor, no matter how attached (except movable trade fixtures), must remain the property of Lessor, unless otherwise stipulated herein, Lessee, however, expressly waiving all right to compensation therefor. The Lessor, at his option, may require the building to be replaced in its original condition.

Lessor or Agent or workmen shall have the right to enter the premises at any time for the purpose of making repairs necessary for the preservation of the property.

EXCLUSIVE USE OF REALTORS

Responsibility for Damages

Lessee assumes responsibility for the condition of the premises and Lessor will not be responsible for damage caused by leaks in the roof, by bursting of pipes by freezing or otherwise, or by any vices or defects of the leased property, or the consequences thereof, except in the case of positive neglect or failure to take action toward the remedying of such defects within reasonable time after having received written notice from Lessee of such defects and the damage caused thereby. Should Lessee fail to promptly so notify Lessor, in writing of any such defects, Lessee will become responsible for any damage resulting to Lessor or other parties.

Signs or Decorations

Lessee is obligated not to display in, on, or above the leased premises any sign or decoration, the nature of which, in the judgment of Lessor is dangerous, unsightly or detrimental to the property. Lessee is prohibited from painting any signs on the leased property without the written consent of Lessor, and Lessee is obligated to promptly remove at or before the expiration of this lease, any and all signs painted or placed in or upon any part of the leased premises, to Lessor's satisfaction and Lessee is obligated to pay the cost of said removal, plus agent's or attorney's fees, in event of failure to carry out this obligation.

Lessor also reserves the right to keep posted on the premises signs "For Sale", or "By Auction" at any time during the term of this lease and also cards "For Rent" during the 120 days preceeding the expiration of this lease; and Lessee must allow parties authorized by Lessor or Agent to visit the premises in view of buying during the term of this lease and in view of renting for 120 days prior to expiration, from 10 A. M. to 5 P. M.

Vacating Premises

In the event of the Lessee being absent from the premises, Lessor or his Agent shall be notified in writing where keys may be had in order that the premises may be shown to prospective tenants or purchasers. In case of the failure of the Lessee to comply with the foregoing conditions, or should Lessee not permit the posting of signs or allow prospective tenants or purchasers to inspect the property, as provided herein, Lessor has the option to consider this lease renewed for one year under the same terms and conditions, or may hold Lessee responsible for damages, and Lessor or Agent has the further option to enter the premises by any means, without responsibility to Lessee for any loss or damage resulting therefrom.

Should the premises be vacated or abandoned by Lessee because of ejectment for breach hereof, or otherwise, or should the Lessee begin to remove personal property or goods to the prejudice of the Lessor's lien, then the rent for the unexpired term, with Attorney's fees, shall at once become due and exigible, and Lessor, at his option, has the right to cancel the lease, or re-enter and let said premises for such price and on such terms as may be immediately obtainable and apply the net amount realized to the payment of the rent.

Surrender Of Premises

At the expiration of this lease, or its termination for other causes, Lessee is obligated to immediately surrender possession, and should Lessee fail to do so, he consents to pay any and all damages, but in no case less than five times the rent per day, with attorney's fees, costs, etc. Lessee also expressly waives any notice to vacate at the expiration or termination of this lease and all legal delays, and hereby confesses judgment with costs placing Lessor in possession to be executed at once. Should Lessor allow or permit Lessee to remain in the leased premises after the expiration or termination of this lease, this shall not be construed as a reconduction of this lease.

Insurance

Lessee is obligated to put nothing in the leased premises nor to do anything which would forfeit the insurance, and should any installation made or action taken by Lessee, whether authorized or unauthorized under this lease, increase the rate of insurance on the building or contents as fixed by the Louisiana Fire Prevention Bureau, or any similar institution, then Lessee is obligated to pay such increased rate of insurance on building and all contents. Should the Lessee's occupancy or business render the Lessor unable to secure proper insurance, then Lessee hereby grants to Lessor the option of cancelling this lease, Lessee waiving all delays, and agreeing to surrender possession at once, if notified by Lessor to do so. Lessee is obligated to notify Lessor or Lessor's Agent, in writing, any time the leased premises will be unoccupied, so that necessary vacancy permits may be obtained from Lessor's insurers, and failure to comply with this condition will make Lessee liable for any loss or damage sustained by Lessor.

Sub-Lease

Lessee is not permitted to rent or sub-let or grant use or possession of the premises to any other party without the written consent of the Lessor, and then only in accordance with the terms of this lease. Should Lessee desire to sub-let, permission must be obtained in writing through Lessor or Agent and such sub-lease shall be handled by Lessor's Agent at expense of the herein Lessee.

No auction sales. or any sales of furniture, fixtures, etc., shall be conducted on the premises without

(80)

Property sold and purchased subject to all title and zoning restrictions on record or by law or ordinance, or the effect of

55feet from corner of Jefferson Highway & Central Ave., and measures 130.56 feet front on Jefferson Highway thence 153.27feet South, thence 60 feet West thence 49.22 ft. South, thence 202ft. to a pipe, thence on an angle 21ft., to Central Ave, thence North on Central Ave., 127 feet thence Westerly 54.42 ft. thence North a distance of 136.30 feet to point of begining, together with all buildings and improvements thereon as per plan of C F Fustis Eng dated Jan. 6th. 1961, attached hereto and made part thereof, for the sum of EIGHTY FIVE THOUSAND And no/100 ($85,000.00) on terms of all CASH. (136.30)

123

This sale is conditioned upon the ability of purchaser to borrow upon this property as security the sum of $_____ by a mortgage loan or loans at a rate of interest not to exceed XX % per annum, interest and principal payable on or before _____ years in equal (monthly) _____ (quarterly) _____ (semi-annual) _____ (annual) _____ installments.

Should purchaser, seller or agent be unable to obtain the loan stipulated above within XX days from acceptance hereof, this contract shall then become null and void and the agent is hereby authorized to return the purchaser's deposit in full. Commitment by lender to make loan subject to approval of title shall constitute obtaining of loan.

Property sold subject to the following lease or leases:

Tenant _____ Rental _____ Expiration _____ Options _____

It is also agreed and understood that this property is zoned C-2 Commercial

Occupancy Vendor to give possession of residence #424 Central Ave., on or before August, 1st. 1962.

All sewerage and street surfacing charges bearing against the property as of this date to be paid by Vendor

Real Estate Taxes and rentals (if any) to be prorated to date of act of sale.

All proper and necessary certificates and revenue stamps to be paid by seller. Cost of survey by Purchaser

Act of sale at expense of purchaser to be passed before Purchasor's Notary, on or prior to July 1st. 1962; provided that if bona fide curative work in connection with title is required, the parties herewith agree to and do extend the time for passing of act of sale by thirty days.

Upon acceptance of this offer, vendor and purchaser shall be bound by all its terms and conditions and purchaser becomes obligated to deposit with seller's agent immediately 10 % of the purchase price amounting to $ 8,500

This deposit is to be non-interest bearing and may be placed in any bank in Metropolitan New Orleans, without responsibility on the part of the agent in case of failure or suspension of such bank.

The seller shall deliver to purchaser a merchantable title, and his inability to deliver such title within the time stipulated herein shall render this contract null and void, reserving unto purchaser the right to demand the return of the deposit from the holder thereof, and reserving unto agent the right to recover commission

In the event the seller fails to comply with this agreement within the time specified or for any other reason, the purchaser shall have the right either to demand the return of his deposit in full plus an equal amount to be paid as penalty by the seller; or the purchaser may demand specific performance, at his option.

In the event the purchaser fails to comply with this agreement within the time specified, the seller shall have the right to declare the deposit, ipso-facto, forfeited, without formality beyond tender of title to purchaser; or the seller may demand specific performance.

In the event the deposit is forfeited, the commission shall be paid out of this deposit, reserving to the seller the right to proceed against the purchaser for the recovery of the amount of the commission.

If this offer is accepted, seller agrees to pay the agent's commission of Six (6) per cent which commission is earned by agent when this agreement is signed by both parties and when the mortgage loan, if any, has been secured.

Either party hereto who fails, for any reason whatsoever, to comply with the terms of this offer, if accepted, is obligated and agrees to pay the agent's commission and all fees and costs incurred in enforcing collection and damages.

Commission to be divided equally between M.L.Morrison & James F. Turnbull.

This offer remains binding and irrevocable through May 23rd. 1962 noon.

Submitted to M.L.Morrison (Owner) (Signed) _____

By James F. Turnbull, Selling Agent

_____ Address

Exclusive Use Of Realtors

Jefferson Parish, La. La.

MAY 22 1962 19____

I/We accept the above in all its terms and conditions.

(Signed) Mrs Catherine U. Morrison

Catherine U. Morrison

Please note the above attached letter dated May 22, 1962 incorporated by reference as if copied in extenso

James Turnbull

Should the premises be vacated or abandoned by Lessee because of ejectment for breach hereof, or otherwise, or should the Lessee begin to remove personal property or goods to the prejudice of the Lessor's lien, then the rent for the unexpired term, with Attorney's fees, shall at once become due and exigible, and Lessor, at his option, has the right to cancel the lease, or re-enter and let said premises for such price and on such terms as may be immediately obtainable and apply the net amount realized to the payment of the rent.

Surrender Of Premises

At the expiration of this lease, or its termination for other causes, Lessee is obligated to immediately surrender possession, and should Lessee fail to do so, he consents to pay any and all damages, but in no case less than five times the rent per day, with attorney's fees, costs, etc. Lessee also expressly waives any notice to vacate at the expiration or termination of this lease and all legal delays, and hereby confesses judgment with costs placing Lessor in possession to be executed at once. Should Lessor allow or permit Lessee to remain in the leased premises after the expiration or termination of this lease, this shall not be construed as a reconduction of this lease.

Insurance

Lessee is obligated to put nothing in the leased premises nor to do anything which would forfeit the insurance, and should any installation made or action taken by Lessee, whether authorized or unauthorized under this lease, increase the rate of insurance on the building or contents as fixed by the Louisiana Fire Prevention Bureau, or any similar institution, then Lessee is obligated to pay such increased rate of insurance on building and all contents. Should the Lessee's occupancy or business render the Lessor unable to secure proper insurance, then Lessee hereby grants to Lessor the option of cancelling this lease, Lessee waiving all delays, and agreeing to surrender possession at once, if notified by Lessor to do so. Lessee is obligated to notify Lessor or Lessor's Agent, in writing, any time the leased premises will be unoccupied, so that necessary vacancy permits may be obtained from Lessor's insurers, and failure to comply with this condition will make Lessee liable for any loss or damage sustained by Lessor.

Sub-Lease

Lessee is not permitted to rent or sub-let or grant use or possession of the premises to any other party without the written consent of the Lessor, and then only in accordance with the terms of this lease. Should Lessee desire to sub-let, permission must be obtained in writing through Lessor or Agent and such sub-lease shall be handled by Lessor's Agent at expense of the herein Lessee.

No auction sales, or any sales of furniture, fixtures, etc., shall be conducted on the premises without the written consent of the Lessor or Agent.

Non-Payment Of Rent Etc.

Should the Lessee at any time violate any of the conditions of this lease, or discontinue the use of premises for the purpose for which they are rented, or fail to pay the rent, water bill, or other expenses assumed under this lease, punctually at maturity, as stipulated; or upon the adjudication of Lessee in bankruptcy, the appointment of a receiver for Lessee, or the filing of a bankruptcy, receivership or respite petition by the Lessee; or upon Lessee's suspension, failure or insolvency; and should such violation continue for a period of 10 days after written notice has been given Lessee, then, at the option of the Lessor, the rent for the whole unexpired term of this lease shall at once become due and exigible; and Lessor shall have the further option to at once demand the entire rent for the whole term, or to immediately cancel this lease, or to proceed for past due installments only, reserving its right to later proceed for the remaining installments, all without putting Lessee in default, Lessee to remain responsible for all damages or losses suffered by Lessor, Lessee hereby assenting thereto and expressly waiving the legal notices to vacate the premises. Should an Agent or Attorney be employed to give special attention to the enforcement or protection of any claim of Lessor arising from this lease, Lessee shall pay, as fees and compensation to such Agent or Attorney an additional sum of ten per cent of the amount of such claim, the minimum fee, however, to be $25.00, or if the claim be not for money, then such sum as will constitute a reasonable fee, together with all costs, charges and expenses.

120

Should Lessee at any time use the leased premises or any portion thereof for any illegal or unlawful purpose, or commit, or permit or tolerate the commission therein of any act made punishable by fine or imprisonment under the laws of the United States or the State of Louisiana, or any ordinance of the City or Parish, the remedies set forth in the preceding paragraph shall be available to lessor immediately without necessity of giving any written notice or any other notice to lessee.

Failure to strictly and promptly enforce these conditions shall not operate as a waiver of Lessor's rights, Lessor expressly reserving the right to always enforce prompt payment of rent, or to cancel this lease, regardless of any indulgences or extensions previously granted. The receiving by Lessor, or Lessor's representative of any rent in arrears, or after notice or institution of any suit for possession, or for cancellation of this lease, will not be considered as a waiver of such notice of suit, or of any of the rights of Lessor.

Fire Clause

If through no lt, neglect, or design of Lessee, the premi s are destroyed by fire or other casualty or damaged to such an extent as to render them wholly unfit for occupancy, then this lease shall be cancelled. If, however, the premises can be repaired within 120 days from date of fire or casualty, then this lease shall not be cancelled, and Lessor shall notify Lessee within 30 days from date of fire or casualty that Lessor will repair the damage, and Lessee shall be entitled only to such a reduction or remission of rent as shall be just and proportionate.

Wherever there is conflict in this lease between the printed clauses and the specially written or typewritten clauses of this lease, the specially written or typewritten clauses shall apply.

All notices required to be given under the terms of this lease shall be in writing and by certified mail addressed to Lessee at the herein leased premises or to Lessor at the address appearing in this lease, and such mailing shall constitute full proof of and compliance with the requirement of notice, regardless whether addressee receives such notice or not.

The parties to this lease understand and agree that the provisions herein shall, between them, have the effect of law, but in reference to matters not provided herein, this lease shall be governed by the ordinances of the City of New Orleans, and the laws of the State of Louisiana.

Lessor, his heirs, successors, or assigns, agrees to pay Lee Pellman & Co. his heirs, successors or assigns a cash commission of 5% on the gross rental of this lease up to $25,000.00 and 4% on such amount above $25,000.00 and a similar commission on any extension or renewal, if there be a privilege. Also a commission of 6% on the first $100,000.00 4% on the excess on any agreement to sell or exchange made with or through Lessee.

In consideration of services rendered by Lee Pellman & Co. in negotiating this lease, Lessor hereby agrees that in the event the herein leased property is sold or transferred during the term of this lease, and there be any unpaid commissions still due Lee Pellman & Co. for negotiating this lease, that Lessor will either pay same or have the purchaser assume same.

Surety

And now comes _____ WHO IS MADE A PARTY to this contract of lease and is bound with Lessee IN SOLIDO for the faithful execution of all the obligations to be performed on the part of the Lessee, and furthermore waives all rights to a release from this obligation due to Lessor's failure to protest for non-payment of rent or due to granting of any extensions or indulgences to Lessee or any modifications of this lease, or due to the filing of a bankruptcy, receivership or respite petition by or against Lessee or discharge in bankruptcy of Lessee, or upon Lessee's suspension, failure or insolvency, or to the appointment of a receiver for Lessee by any competent court.

121

This lease is made and signed in triplicate, in the City of New Orleans, State of Louisiana, this 12th day of June 19 62

LEO FELLMAN & CO. is hereby authorized to sign this lease as my agent.

_____
Lessee

WHITNEY NATIONAL BANK Dry Jefferson Parish

_____
Lessor

By: M. C. Murphy
V.P. & Cashier

Lessor's Affidavit

State of _____ }
County of _____ } ss.

On this _____ day of _____ 19_____, before me, the undersigned authority, personally came and appeared _____ resident of _____, who declared and acknowledged to me that he executed the foregoing instrument and signed the same for the purpose and objects therein expressed, acting in the capacity of _____, and by order of the Board of Directors, of _____

IN TESTIMONY WHEREOF, I have set my hand and seal in the City of _____ State of _____.

My commission expires _____

_____
Notary Public.

Lessee's Affidavit

State of _____ }
County of _____ } ss.

On this _____ day of _____ 19_____, before me, the undersigned authority, personally came and appeared _____ resident of _____, who declared and acknowledged to me that he executed the foregoing instrument and signed the same for the purpose and objects therein expressed, acting in the capacity of _____, and by order of the Board of Directors, of _____

IN TESTIMONY WHEREOF, I have set my hand and seal in the City of _____ State of _____

My commission expires _____

_____
Notary Public.

Assignment

For value received I/we hereby assign all my/our rights, title and interest in and to the within lease unto _____, his heirs, successors or assigns, with full subrogation.

_____
Lessor

Witnesses:

_____

_____

AGREEMENT TO PURCHASE OR SELL

For exclusive use of "Realtors"

JA[illegible] F. Turnbull Realtor
[illegible]0 Jefferson Highway
P.O.Box 23-193 Harahan, La.
Phone 729-3[illegible]
Member Real Estate Board of New Orleans, Inc.

FORM ATP-OS NO 2
R Revised and approved Feb 1959
Standard Form
Real Estate Board
of New Orleans, Inc.

(1)

James F. Turnbull Agent New Orleans, La. La. May 22, 1962 19

1. We offer and agree to purchase That portion of land located in Jefferson
2. Parish, La., in Suburban Acres Subdivision, beginning at a distance of
3. 55feet from corner of Jefferson Highway & Central Ave., and measures
4. 130.56 feet front on Jefferson Highway thence 153.27feet South, thence
(80) 5. Co feet West thence 19.22 ft. South, thence 202[illegible] to a pipe, thence
6. on an angle 21ft., to Central Ave, thence North on Central Ave., 127
7. feet thence Westerly 54.42 ft. thence North a distance of [illegible]36.30feet to(136.30)
8. point of beginning , together with all buildings and improvements there
9. on as per plan of C F Fustis Eng dated Jan. 6th. 1961, attached here-
10. to and made part thereof, for the sum of EIGHTY FIVE THOUSAND And no/100
11. $85,000.00) on terms of all CASH.

123

12. This sale is conditioned upon the ability of purchaser to borrow upon this property as security the sum of $
13. by a mortgage loan or loans at a rate of interest not to exceed XX % per annum, interest and principal payable on or before
14. years in equal (monthly) (quarterly) XX (semi-annual) (annual) installments.
15. Should purchaser, seller or agent be unable to obtain the loan stipulated above within XX days from acceptance hereof,
16. this contract shall then become null and void and the agent is hereby authorized to return the purchaser's deposit in full. Commitment
17. by lender to make loan subject to approval of title shall constitute obtaining of loan.
18. Property sold subject to the following lease or leases:
19. Tenant Rental Expiration Options It is also agreed and understood that this property is zoned C-2 Commercial
20. Vendor to give possession of residence #424 Central Ave., on or before
21. August, 1st. 1962.
22. Occupancy
23. All sewerage and street surfacing charges bearing against the property as of this date to be paid by Vendor
24. Real Estate Taxes and rentals (if any) to be prorated to date of act of sale.
25. All proper and necessary certificates and revenue stamps to be paid by seller. Cost of survey by Purchaser
26. Act of sale at expense of purchaser to be passed before Purchaser's Notary, on or prior to
27. July 1st. 19 62, provided that if bona fide curative work in connection with title is required, the parties
28. herewith agree to and do extend the time for passing of act of sale by thirty days.
29. Upon acceptance of this offer, vendor and purchaser shall be bound by all its terms and conditions and purchaser becomes obligated
30. to deposit with seller's agent immediately 10 % of the purchase price amounting to $ 8,500
31. This deposit is to be non-interest bearing and may be placed in any bank in Metropolitan New Orleans, without responsibility
32. on the part of the agent in case of failure or suspension of such bank.
33. The seller shall deliver to purchaser a merchantable title, and his inability to deliver such title within the time stipulated herein
34. shall render this contract null and void, reserving unto purchaser the right to demand the return of the deposit from the holder thereof,
35. and reserving unto agent the right to recover commission
36. In the event the seller fails to comply with this agreement within the time specified or for any other reason, the purchaser shall
37. have the right either to demand the return of his deposit in full plus an equal amount to be paid as penalty by the seller, or the pur-
38. chaser may demand specific performance, at his option.
39. In the event the purchaser fails to comply with this agreement within the time specified, the seller shall have the right to
40. declare the deposit, ipso-facto, forfeited, without formality beyond tender of title to purchaser; or the seller may demand specific per-
41. formance.
42. In the event the deposit is forfeited, the commission shall be paid out of this deposit, reserving to the seller the right to pro-
43. ceed against the purchaser for the recovery of the amount of the commission.
44. If this offer is accepted, seller agrees to pay the agent's commission of Six (6) per cent which
45. commission is earned by agent when this agreement is signed by both parties and when the mortgage loan, if any, has been secured.
46. Either party hereto who fails, for any reason whatsoever, to comply with the terms of this offer, if accepted, is obligated and
47. agrees to pay the agent's commission and all fees and costs incurred in enforcing collection and damages.
48. Commission to be divided equally between L.L.Morrison & James F.
49. Turnbull.
50. This offer remains binding and irrevocable through May 23rd 1962 noon.

For Exclusive Use Of Realtors

June 5, 1962

Mr. Kennedy Gilly,
c/o Milling, Saal, Saunders, Benson & Woodward
Whitney Building
New Orleans, Louisiana

Dear Mr. Gilly -

The Bank has been negotiating for the purchase of a piece of property on Jefferson Highway and Central Avenue in Jefferson Parish in connection with the operation of the Whitney National Bank in Jefferson Parish.

We enclose herewith the following -

Copy of Summary No. 650-Ordinance No. 4325 adopted November 12, 1959 by Jefferson Parish Council, zoning lots B X D E F and G as C-2 Commercial.

Copy of Summary No. 1322-Ordinance No. 4959 adopted March 8, 1961, approving plan of resubdivision of lots B X D E F and G Suburban Acres, by Jefferson Parish Council.

Original letter from Hermann & Hermann to Miss Catherine J. Mixon, dated August 19, 1957, re property 4403 Jefferson Hwy.

Copy of Act of Mortgage by Catherine J. Mixon, et al to First National Life Insurance Co., July 31, 1957.

Release of Mortgage before Frank S. Hermann, from Security Bldg. & Loan Assn., $30,000.00 dated July 31, 1957,

and a plat of the property.

We would like for the title of the property to be examined and would appreciate your handling the transaction for us.

Cordially yours,

John C. Shea,
Vice President

JCS:jes
encls.

RECEIPT IS HEREBY ACKNOWLEDGED OF THE ABOVE WITHIN DESCRIBED

KMG DATE 6/5/62

124

WHITNEY NATIONAL BANK

IN JEFFERSON PARISH
JEFFERSON PARISH, LA.

Please destroy any remaining checks of this temporary supply to prevent unauthorized use

We welcome you as a depositor of our bank and will constantly strive to make our relationship pleasant and mutually satisfactory. Our officers and staff will gladly assist you in your banking requirements and we invite you to make full use of our facilities.

JAMES GILLY, JR., President

CHECK NO	DATE	CHECK ISSUED TO	AMOUNT OF CHECK	DATE OF DEP	AMOUNT OF DEPOSIT	BALANCE

We welcome you as a depositor of our bank and will constantly strive to make our relationship pleasant and mutually satisfactory. Our officers and staff will gladly assist you in your banking requirements and we invite you to make full use of our facilities.

JAMES GILLY, JR., President

CHECK NO	DATE	CHECK ISSUED TO	AMOUNT OF CHECK	DATE OF DEP	AMOUNT OF DEPOSIT	BALANCE

_____ 19 ___ No _____

WHITNEY NATIONAL BANK

84-517
650

IN JEFFERSON PARISH
JEFFERSON PARISH LA

PAY TO
THE ORDER OF _____ $ _____

_____ DOLLARS

CENTS

126

WHITNEY NATIONAL BANK 64-517/650
IN JEFFERSON PARISH
JEFFERSON PARISH, LA

CUSTOMER'S DRAFT

_____ 19____

Pay to the order of _____ $

_____ Dollars

VALUE RECEIVED AND CHARGE TO ACCOUNT OF _____ WITH EXCHANGE

To _____

_____

151

ORIGINAL

WHITNEY NATIONAL BANK

IN JEFFERSON PARISH
JEFFERSON PARISH LA

NUMBER _____

Pay to the order of _____ $ _____

_____ Dollars

_____
AUTHORIZED SIGNATURE

ORIGINAL

WHITNEY NATIONAL BANK

IN JEFFERSON PARISH
JEFFERSON PARISH LA

NUMBER _____

Pay to the order of _____ $ _____

_____ Dollars

_____
AUTHORIZED SIGNATURE

128

WHITNEY NATIONAL BANK

IN JEFFERSON PARISH

JEFFERSON PARISH, LA.

ES GILLY, JR.

PRESIDENT

BALANCE BROUGHT FORWARD

1/ 19

TO

FOR

AMOUNT DEPOSITED

TOTAL

AMOUNT THIS CHECK

BALANCE FORWARD

WHITNEY NATIO
IN JEFFERSON PAI
JEFFERSON PARIS

PAY TO
THE ORDER OF

1/ 19

TO

FOR

AMOUNT DEPOSITED

TOTAL

AMOUNT THIS CHECK

BALANCE FORWARD

WHITNEY NATIO
JEFFERSON PARIS

PAY TO
THE ORDER OF

1/ 19

TO

FOR

AMOUNT DEPOSITED

TOTAL

AMOUNT THIS CHECK

BALANCE FORWARD

WHITNEY NATIO

PAY TO
THE ORDER OF

_____ 19 ____ No

WHITNEY NATIONAL BANK 84 517 / 650

IN JEFFERSON PARISH
JEFFERSON, PARISH, LA

PAY TO
THE ORDER OF _____ $

_____ DOLLARS

_____

_____ 19 ____ No

WHITNEY NATIONAL BANK 84 517 / 650

IN JEFFERSON PARISH
JEFFERSON PARISH, LA

PAY TO
THE ORDER OF _____ $

_____ DOLLARS

_____

_____ 19 ____ No

WHITNEY NATIONAL BANK 84 517 / 650

IN JEFFERSON PARISH
JEFFERSON PARISH, LA

PAY TO
THE ORDER OF _____ $

_____ DOLLARS

_____

MERCHANTS TRUST & SAVINGS BANK

STATEMENT OF CONDITION

at the close of business

DECEMBER 31, 1961

RESOURCES

Cash and Due from Banks	$2,056,425.29
U. S. Government Securities	602,284.60
State and Municipal Bonds	1,581,238.76
Federal Reserve Bank Stock	12,000.00
Loans and Discounts	3,161,875.11
Furniture and Fixtures, etc.	164,920.13
Other Assets	7,633.97
Total Resources	$7,586,377.29

LIABILITIES

Capital Stock	$187,500.00	
Surplus	212,500.00	
Undivided Profits	62,914.20	$ 462,914.20
Reserve for Taxes, etc.		838.15
Deposits		7,122,624.94
Total Liabilities		$7,586,377.29

No. _____

DATE _____ 19 ____

To _____

FOR _____

	DOLLARS	CENTS
BALANCE BROUGHT FORWARD		
AMOUNT DEPOSITED		
TOTAL		
AMOUNT THIS CHECK		
BALANCE CARRIED FORWARD		

_____ 19 ____ No. _____

WHITNEY NATIONAL BANK 84-517/650
IN JEFFERSON PARISH
JEFFERSON PARISH, LA

PAY TO THE ORDER OF _____ $ _____

_____ DOLLARS

_____

No. _____

DATE _____ 19 ____

To _____

FOR _____

	DOLLARS	CENTS
BALANCE BROUGHT FORWARD		
AMOUNT DEPOSITED		
TOTAL		
AMOUNT THIS CHECK		
BALANCE CARRIED FORWARD		

_____ 19 ____ No _____

WHITNEY NATIONAL BANK 84-517/650
IN JEFFERSON PARISH
JEFFERSON PARISH, LA.

PAY TO THE ORDER OF _____ $ _____

_____ DOLLARS

_____

No. _____

DATE _____ 19 ____

To _____

FOR _____

	DOLLARS	CENTS
BALANCE BROUGHT FORWARD		
AMOUNT DEPOSITED		
TOTAL		
AMOUNT THIS CHECK		
BALANCE CARRIED FORWARD		

_____ 19 ____ No. _____

WHITNEY NATIONAL BANK 84-517/650
IN JEFFERSON PARISH
JEFFERSON PARISH, LA

PAY TO THE ORDER OF _____ $ _____

_____ DOLLARS

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TOTAL		
AMOUNT THIS CHECK		
BALANCE CARRIED FORWARD		

No. _____

DATE _____ 19____

To _____

FOR _____

	DOLLARS	CENTS
BALANCE BROUGHT FORWARD		
AMOUNT DEPOSITED		
TOTAL		
AMOUNT THIS CHECK		
BALANCE CARRIED FORWARD		

No. _____

DATE _____ 19____

To _____

FOR _____

	DOLLARS	CENTS
BALANCE BROUGHT FORWARD		
AMOUNT DEPOSITED		
TOTAL		
AMOUNT THIS CHECK		
BALANCE CARRIED FORWARD		

No. _____

DATE _____ 19____

To _____

FOR _____

	DOLLARS	CENTS
BALANCE BROUGHT FORWARD		
AMOUNT DEPOSITED		
TOTAL		
AMOUNT THIS CHECK		
BALANCE CARRIED FORWARD		

_____ 19____ No. _____

WHITNEY NATIONAL BANK 84-517/650
IN JEFFERSON PARISH
JEFFERSON PARISH, LA.

PAY TO THE ORDER OF _____ $ _____

_____ DOLLARS

_____

_____ 19____ No _____

WHITNEY NATIONAL BANK 84-517/650
IN JEFFERSON PARISH
JEFFERSON PARISH, LA.

PAY TO THE ORDER OF _____ $ _____

_____ DOLLARS

_____

_____ 19____ No. _____

WHITNEY NATIONAL BANK 84-517/650
IN JEFFERSON PARISH
JEFFERSON PARISH, LA.

PAY TO THE ORDER OF _____ $ _____

_____ DOLLARS

_____

130

No. _____

DATE _____ 19 ____

To _____

FOR _____

	DOLLARS	CENTS
BALANCE BROUGHT FORWARD		
AMOUNT DEPOSITED		
TOTAL		
AMOUNT THIS CHECK		
BALANCE CARRIED FORWARD		

_____ 19 ____ No _____

WHITNEY NATIONAL BANK 84-517/650

IN JEFFERSON PARISH
JEFFERSON PARISH LA

PAY TO
THE ORDER OF _____ $ _____

_____ DOLLARS

_____

No. _____

DATE _____ 19 ____

To _____

FOR _____

	DOLLARS	CENTS
BALANCE BROUGHT FORWARD		
AMOUNT DEPOSITED		
TOTAL		
AMOUNT THIS CHECK		
BALANCE CARRIED FORWARD		

_____ 19 ____ No _____

WHITNEY NATIONAL BANK 84-517/650

IN JEFFERSON PARISH
JEFFERSON PARISH LA

PAY TO
THE ORDER OF _____ $ _____

_____ DOLLARS

_____

No. _____

DATE _____ 19 ____

To _____

FOR _____

	DOLLARS	CENTS
BALANCE BROUGHT FORWARD		
AMOUNT DEPOSITED		
TOTAL		
AMOUNT THIS CHECK		
BALANCE CARRIED FORWARD		

_____ 19 ____ No _____

WHITNEY NATIONAL BANK 84-517/650

IN JEFFERSON PARISH
JEFFERSON PARISH LA

PAY TO
THE ORDER OF _____ $ _____

_____ DOLLARS

_____

AMOUNT THIS CHECK

BALANCE CARRIED FORWARD

No. _____

DATE _____ 19 ____

To _____

FOR _____

	DOLLARS	CENTS
BALANCE BROUGHT FORWARD		
AMOUNT DEPOSITED		
TOTAL		
AMOUNT THIS CHECK		
BALANCE CARRIED FORWARD		

_____ 19 ____ No _____

WHITNEY NATIONAL BANK 84-517/650
IN JEFFERSON PARISH
JEFFERSON PARISH LA

PAY TO THE ORDER OF _____ $ _____

_____ DOLLARS

_____

No. _____

DATE _____ 19 ____

To _____

FOR _____

	DOLLARS	CENTS
BALANCE BROUGHT FORWARD		
AMOUNT DEPOSITED		
TOTAL		
AMOUNT THIS CHECK		
BALANCE CARRIED FORWARD		

_____ 19 ____ No _____

WHITNEY NATIONAL BANK 84-517/650
IN JEFFERSON PARISH
JEFFERSON PARISH LA

PAY TO THE ORDER OF _____ $ _____

_____ DOLLARS

_____

No. _____

DATE _____ 19 ____

To _____

FOR _____

	DOLLARS	CENTS
BALANCE BROUGHT FORWARD		
AMOUNT DEPOSITED		
TOTAL		
AMOUNT THIS CHECK		
BALANCE CARRIED FORWARD		

_____ 19 ____ No _____

WHITNEY NATIONAL BANK 84-517/650
IN JEFFERSON PARISH
JEFFERSON PARISH LA

PAY TO THE ORDER OF _____ $ _____

_____ DOLLARS

_____

EXHIBIT B

132

STATEMENT OF CONDITION

as of

DECEMBER 31, 1961

OFFICERS

EDWARD C. BOYER, President and Cashier
SAM A. WOOL, Executive Vice-President
WILLIAM E. MILLER, JR., Assistant Cashier
PAUL D. PAGE, Assistant Cashier
ARCHIE R. USHER, Assistant Cashier

★ ★

DIRECTORS

EDWARD C. BOYER — FRANK C. DUPEPE
WM. R. MANCUSO — HENRY RAZIANO
LOUIS J. ROUSSEL — EDWARD J. STOULIG
SAM A. WOOL



MERCHANTS TRUST & SAVINGS BANK
"Your Neighborhood Bank"
KENNER, LOUISIANA • POST OFFICE BOX 458

Member, Federal Deposit Insurance Corporation
Member, Federal Reserve System

WILLIAM HARRY TALBOT
Attorney at Law and Notary Public
808 Whitney Building
New Orleans 12

MAgnolia 5145

July 12, 1961

Mr. Keehn W. Berry, President,
Whitney National Bank of New Orleans,
New Orleans, Louisiana.

Dear Mr. Berry:

On April 27, 1961 I sold to Louis J. Roussel for the account of the Succession of J. P. Morgan, Edward C. Morgan and Patricia Morgan, 5,661 shares of the capital stock of Merchants Trust and Savings Bank, Kenner, Louisiana, for $261,475.38 cash. I received Cashier's checks on the National American Bank of New Orleans amounting to this sum, in full payment therefor.

According to the list of stockholders which I had, at that time there were 12,500 shares of stock outstanding.

Very truly yours,

WM. H. TALBOT

wht/me

WALL STREET JOURNAL

June 14, 1961

Holder Starts Proxy Battle for Control of Whitney National Bank in New Orleans

By a WALL STREET JOURNAL *Staff Reporter*

NEW ORLEANS—A stockholder, dissatisfied with the dividend policy of Whitney National Bank, has started a proxy fight for control of the bank, Louisiana's largest and one of the biggest in the South.

The dissident stockholder is Louis J. Roussel, who said he holds 3,000 to 5,000 shares of the bank's 112,000 shares outstanding. Mr. Roussel said he is a former street car conductor and oil field worker who now is an oil producer and real estate man. He claimed to be Whitney's third largest

stockholder. The only larger holders, Mr. Roussel said, are a Pittsburgh woman and the pension fund of the U. S. Steel Corp.

Last April Whitney National listed total assets of nearly $476 million. New Orleans' next largest bank, the National Bank of Commerce, has assets of $257 million.

In a letter mailed to the bank's shareholders, Mr. Roussel said his main complaint is dividends, currently paid at an annual rate of $4 a share. "They started that rate in 1949, when earnings were $14.25 a share; last year earnings were $30.87, and they still paid $4," Mr. Roussel said.

If his fight for control succeeds, Mr. Roussel said, he will call for a 10-for-1 stock split and a dividend increase to an annual rate of $20. He said he would ask that Keehn W. Berry be replaced as president, but did not disclose who he would propose for the job.

Mr. Roussel also said he would demand an audit to determine what the "hidden assets" of the bank are and insist on following what he claimed is "the advice of the national bank examiners and sell all of the hidden assets the bank now owns." Proceeds of the sale, he said, would be divided among shareholders. Mr. Roussel said such hidden assets consist of land holdings, among other things.

"There are enough small stockholders to gain working control of the bank, with the help of cumulative voting, Mr. Roussel stated. Under cumulative voting, a stockholder can multiply his shares by the number of directors posts up for a vote, and concentrate or distribute these votes as he wishes. Mr. Roussel said he hopes to name at least six of the 17 members of the board at the annual meeting next January 9.

Bank officials have made little comment on Mr. Roussel's efforts, except to acknowledge they are aware of them. As to Mr. Roussel's chances, board member Morgan Whitney says, "Anybody's guess is as good as mine."

A broker who handles Whitney stock in over-the-counter trading says, "You can bet they're worried. Both sides are buying all the stock they can get. Three weeks ago you could buy Whitney for $400 a share; now it's $480 bid, and there's none offered."

Mr. Roussel said he decided to make a move for control of Whitney after a disagreement over interest rates on a $1.5 million loan the bank made him. "They told me if I didn't like it I could borrow my money at another bank."

So, he said, he sent a check to pay off the loan on a Friday afternoon, but was told he'd have to keep paying interest until Monday, a matter of $800. "I told them that wasn't even legal and I was starting a fight for control right then," he continued.

"I'm willing to invest up to $10 million buying shares and soliciting proxies," Mr. Roussel said. Two years ago he waged a similar campaign against another New Orleans bank, the National American Bank, and was successful.

In that campaign, he said, directors decided to work with him after his proxy fight intentions were announced. He said he owned personally 15% of National American and represented about 40% of the stock. Mr. Roussel stated that his group won seven seats on the board, including one currently held by himself, and won the support of eight additional directors on the 25-man board.

Filed June 21, 1962

EXHIBIT C

139

OFFICERS

VIC J. PASSERA — *President*
F. M. LEGUENEC, JR. — *Vice President and Cashier*
LOUIS H. CLAY — *Vice President*
HOWARD S. COX — *Vice President*
JOSEPH S. DELANEY — *Vice President, Mgr. Metairie Office*
VICTOR J. KURZWEG, JR. — *Vice President*
SHELLEY SCHUSTER — *Vice President*
CLEBERT C. SMITH — *Vice President*
FRANK A. GRECO — *Vice President, Mgr. Harahan Office*
NUMA J. BARROIS — *Assistant Vice President*
EDWARD SMIRA — *Assistant Cashier & Manager Veterans Highway Office*
DAVID J. VOGLER — *Assistant Cashier*
DANIEL B. RYAN — *Assistant Cashier & Manager Consumer Credit Dept.*
CLEVELAND GONZALES — *Manager Discount Dept.*

ADVISORY COMMITTEE

HAROLD BUCHLER — *Attorney*
SIDNEY W. CAMPBELL — *President, S. W. Campbell & Son, Inc.*
SAM CARO — *President, Southern Tailoring Co., Inc.*
JOSEPH LUCAS — *President, Medical Arts Pharmacy, Inc.*
THURSTON B. MARTIN — *President, First National Life Ins. Co.*
GEORGE J. PECORARO — *Business Consultant*
ROSS WILLS — *Vice President, C. W. Vollmer and Co., Inc.*
HAROLD B. WISE — *President, Harold's Cafeteria*

McDONALD, BUCHLER & CARR, *Attorneys*

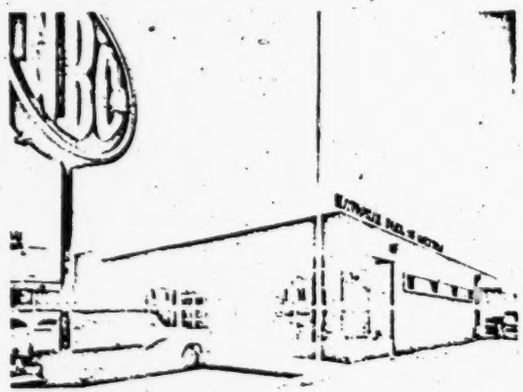
SERVICES

COMMERCIAL ACCOUNTS
PERSONAL ACCOUNTS
SAVINGS DEPARTMENT
COMMERCIAL LOANS
PERSONAL LOANS
AUTOMOBILE LOANS
REAL ESTATE MORTGAGE LOANS
HOME IMPROVEMENT LOANS
TRAVELERS CHEQUES
GUARANTEED CHECKS
SAFE DEPOSIT VAULTS
CHRISTMAS CLUB

HEAD OFFICE—2400 Jefferson Highway
METAIRIE OFFICE—2030 Metairie Road
HARAHAN OFFICE—6318 Jefferson Hwy.
Veterans Hwy. Office—5300 Veterans Hwy.



HEAD OFFICE
Jefferson Highway at Labarre Road



METAIRIE OFFICE
2030 Metairie Road



HARAHAN OFFICE
Jefferson Highway at Oak Avenue

THE NATIONAL BANK OF COMMERCE

IN JEFFERSON PARISH

NBC IN JEFFERSON PARISH

STATEMENT OF CONDITION

DECEMBER 31, 1960

THE NATIONAL BANK OF COMMERCE

IN JEFFERSON PARISH (LOUISIANA)

DIRECTORS

WILLIAM E. CASSIDY
Asst. Div. Sales Manager, Texaco, Inc.

LOUIS H. CLAY — *Board Chairman, Southern Ford Tractor Corporation*

HOWARD S. COX — *Vice President*

GEORGE S. FARNSWORTH — *President, R. P. Farnsworth & Co., Inc.*

S. J. GONZALES, JR. — *President, Southern School Equipment Co., Inc.*

WILLIAM T. HESS
Vice-President & Chief Engineer, Louisiana Power & Light Co.

DR. VIRGIL T. JACKSON, JR. — *Dentist*

ARTHUR L. JUNG, JR. — *Secretary, Crescent Bed Co., Inc.*

VICTOR J. KURZWEG, JR. — *President, Consolidated Companies, Inc.*

F. M. LEGUENEC, JR.
Vice President and Cashier

C. C. McKIRAHAN — *Retired*

JOHN A. MILLER — *President, Brown-Miller Company*

R. A. MITCHELL — *President, Louisiana Transit Co., Inc.*

ROBERT M. MONSTED — *President, Jefferson Cold Storage, Inc.*

DR. ALTON OCHSNER
Physician and Surgeon

JOHN OULLIBER — *President, The National Bank of Commerce in New Orleans*

HENRY F. OWSLEY, JR. — *Partner, Owsley Insurance Agency*

VIC J. PASSERA — *President*

SHELLEY SCHUSTER
Executive Representative, Robert Gair Paper Products Group, Continental Can Co., Inc.

CLEBERT C. SMITH
Executive Vice President, Correspondent Banking-Credits, The National Bank of Commerce in New Orleans

STATEMENT OF CONDITION

DECEMBER 31, 1960

RESOURCES

Cash on Hand and Due from Banks	$ 2,974,685.30
U. S. Government Securities	8,546,178.98
Obligations of U. S. Government Instrumentalities	735,542.70
Stock in Federal Reserve Bank	30,000.00
Municipal Securities	1,565,704.20
Loans and Discounts	5,342,035.63
Bank Buildings and Leasehold Improvements	437,263.98
Furniture and Fixtures	165,140.35
Accrued Interest and Other Assets	115,283.08
TOTAL RESOURCES	$19,911,834.22

LIABILITIES

Deposits		$18,124,411.21
Discount Collected but not Earned		69,486.40
Reserve for Taxes, Interest and Expenses		421,578.62
TOTAL LIABILITIES		18,615,476.23
Capital Stock *(60,000 Shares, $10.00 Par)*	600,000.00	
Surplus	400,000.00	
Undivided Profits	296,357.99	
Total Capital Funds		$ 1,296,357.99
TOTAL		$19,911,834.22

Member Federal Deposit Insurance Corporation

This Bank is a Legal Affiliate of The National Bank of Commerce in New Orleans

EXHIBIT D

Filed June 21, 1962

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION

Civil Action No. 10,623

ORLEANS PARISH SCHOOL BOARD, ET ALS

vs.

WHITNEY NATIONAL BANK, ET ALS

MOTION TO DISMISS

The National Bank of Commerce in New Orleans, through undersigned counsel, moves the Court to dismiss the complaint herein on the following grounds:

I

That the Court is without jurisdiction for the reason that both the plaintiff and mover are citizens of the same State and the complaint discloses no other grounds upon which the jurisdiction of this Court may be invoked.

II

Alternatively, mover avers that it is, and always has been, desirous of disbursing the funds on deposit with it and which are the subject of this proceeding, on the order of the persons rightfully entitled thereto. However, as will appear from the complaint herein, the ownership of said funds is in dispute, others not parties to this suit claiming title thereto, so that no orders or decrees should be rendered herein unless and until the dispute has been resolved and the ownership of the funds has been determined.

WHEREFORE, mover respectfully prays that the complaint filed herein be dismissed. And for all general and equitable relief.

A. J. WAECHTER, JR. & GEORGE DENEGRE OF JONES, WALKER, WAECHTER, POITEVENT, CARRERE & DENEGRE, *Attorneys for Movant*,
1547 National Bank of Commerce Bldg.,
New Orleans, 12, Louisiana.

Clerk's Office, a true copy, June 16, 1962.

MURIEL H. JONES, Deputy Clerk, U.S. District Court, Eastern District of Louisiana, New Orleans, La.

CERTIFICATE

I hereby certify that a copy of the above and foregoing motion has been served on opposing counsel by placing a copy of same in the United States Mail, postage prepaid, on this 5th day of December, 1960.

(Sgd.) A. J. WAECHTER, JR.

Clerk's Office, a true copy, June 16, 1962.
MURIEL H. JONES, Deputy Clerk, U.S. District Court, Eastern District of Louisiana, New Orleans, La.

Filed June 21, 1962

EXHIBIT E

DIRECTORS

LEON E. BER

EDWARD L. CHAPOTEL
Vice President, Katz & Besthoff, Inc.

GEORGE DENÈGRE
Attorney

LAURANCE EUSTIS, JR.
Eustis & Godchaux

RALPH H. FISHMAN
Attorney

RUFUS W. FONTENOT

OLIN LINN
President, New Orleans Motor Co., Inc.

MORGAN W. McCALL
Executive Vice-President
Louisiana Industries, Inc.

LAWRENCE A. MERRIGAN
President

deLESSEPS S. MORRISON
Mayor, City of New Orleans

RICHARD M. NASH

ROBERT J. PATERSON
R. J. Paterson Insurance Agency

AUGUST PEREZ, JR.
August Perez & Associates, Architects

HAROLD T. SHALETT
Berkshire Oil Co.

FISHER E. SIMMONS, JR., C.L.U.
General Agent,
Pan-American Life Insurance Co.

JOSEPH B. STOREY
Vice-President, Southdown, Inc.

A. J. WAECHTER, JR.
Attorney

LOUIS H. YARRUT

CHARLES C. ZATARAIN
Chas. C. Zatarain & Son, Brokers

OFFICERS—MAIN OFFICE

LAWRENCE A. MERRIGAN
President

JACQUES A. LIVAUDAIS
Executive Vice-President

OLIN LINN
Vice-President

RICHARD M. NASH
Vice-President

RALPH M. FRANCE
Vice-President

JOHN E. PREVOST
Assistant Vice-President & Cashier

STEPHEN J. LOUP, JR.
Assistant Vice-President & Comptroller

LOUIS V. CARAMBAT
Assistant Vice-President

DONALD C. HANEY
Assistant Vice-President

VINCENT J. PEREZ, III
Auditor

THOMAS A. DAVENPORT
Assistant Cashier

KATHERINE EBRENZ
Assistant Cashier

ARTHUR J. PARHAM
Assistant Cashier

BEAUREGARD A. REDMOND
Assistant Cashier

ROBERT S. REHM
Assistant Cashier

H. KEITH SEYMOUR
Assistant Cashier

HENRY F. THOMPSON
Assistant Cashier

AUGUST J. TRAMONTE
Assistant Cashier

MARCUS TULLY II
Assistant Cashier

ANITA MAYER
Vault Custodian

MRS. MARGARET JOHNSON
Manager, School Savings Department

BERTHE ARTIGUES
Administrative Secretary to the Board

143

JONES, WALKER, WAECHTER, POITEVENT, CARRÈRE & DENEGRE

General Civil and Admiralty Practice in the State and Federal Courts

1547 NATIONAL BANK OF COMMERCE BUILDING
NEW ORLEANS 12, LOUISIANA

Telephone 523-6641
L.D. 644
Cable Address "JOWA"

MEMBERS OF FIRM

Joseph Merrick Jones, born New Orleans, Louisiana, August 30, 1903; admitted to bar, 1925, Louisiana. Preparatory education, The Hill School and Tulane University of Louisiana (A.B., 1925); legal education, Tulane University of Louisiana (LL.B., 1925). *Fraternities:* Phi Delta Phi; Order of Coif. President, Board of Administrators, Tulane University Educational Fund, 1950—. *Member:* New Orleans (President, 1955), Louisiana State (Member, Board of Governors, 1953-54) and American Bar Associations; International Association of Insurance Counsel.

Arthur J. Waechter, Jr., born New Orleans, Louisiana, November 20, 1913; admitted to bar, 1936, Louisiana. Preparatory education, Tulane University, New Orleans, La. (B.A., 1934); legal education, Tulane (LL.B., 1936). *Fraternities:* Phi Delta Phi; Order of Coif. Professor of Law, Tulane University, 1947-

Law Association of the United States; International Association of Insurance Counsel.

George Denegre, born New Orleans, Louisiana, October 10, 1923; admitted to bar, 1948, Louisiana. Preparatory education, Yale University (A.B., 1943); legal education, Tulane University (LL.B., 1948). *Fraternities:* Phi Delta Phi; Order of Coif. *Member:* New Orleans, Louisiana State and American Bar Associations; Maritime Law Association of the United States.

Michael J. Moloney, Jr., born New Orleans, Louisiana, September 2, 1922; admitted to bar, 1950, Louisiana. Preparatory education, Tulane University; legal education, Tulane University (LL.B., 1950). *Fraternity:* Phi Delta Phi. Assistant Secretary and Ex-Officio Member of Council, Louisiana State Law Institute, 1958—. Institute Labor Law Study

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local economic and social organizations; to prevent the undesirable concentration of control in the banking field to the detriment of the public interest; to insure effective competition among all banking institutions; and, to accomplish these objectives by prohibiting the formation of new banking holding companies and the acquisition of control by whatever means of additional banking institutions by existing bank holding companies and by their subsidiaries.

SECTION 2. DEFINITIONS.

(a) "Bank holding company" means any company, including a bank, (1) which directly or indirectly owns, controls, or holds with power to vote, 15 per centum or more of the voting shares of any bank, or (2) which controls in any manner the election of a majority of the directors of any bank, or (3) for the benefit of whose shareholders or members 15 per centum or more of the voting shares of any bank or a bank holding company is held by trustees; and for the purposes of this Act, any successor to any such company shall be deemed to be a bank holding company from the date as of which such predecessor company became

151

Exhibit 11

Filed June 21, 1962

EXHIBIT F

"Martindale - Hubbell Law Directory
Sixty-Fourth Year - 1962 - Volume II"

Joseph Merrick Jones, born New Orleans, Louisiana, August 30, 1903; admitted to bar, 1925, Louisiana. Preparatory education, The Hill School and Tulane University of Louisiana (A.B., 1925); legal education, Tulane University of Louisiana (LL.B., 1925). *Fraternities:* Phi Delta Phi; Order of Coif. President, Board of Administrators, Tulane University Educational Fund, 1950—. *Member:* New Orleans (President, 1955), Louisiana State (Member, Board of Governors, 1953-54) and American Bar Associations; International Association of Insurance Counsel.

Arthur J. Waechter, Jr., born New Orleans, Louisiana, November 20, 1913; admitted to bar, 1936, Louisiana. Preparatory education, Tulane University, New Orleans, La. (B.A., 1934); legal education, Tulane (LL.B., 1936). *Fraternities:* Phi Delta Phi; Order of Coif. Professor of Law, Tulane University, 1947—. *Member:* New Orleans, Louisiana State and American Bar Associations; International Association of Insurance Counsel; Maritime Law Association of the United States.

J. Mort Walker, Jr., born New Orleans, Louisiana, February 10, 1904; admitted to bar, 1936, Louisiana. Preparatory education, Tulane University (B.E., 1925); legal education, Loyola University of the South (LL.B., 1936). Member of The Council, Louisiana State Law Institute, 1938-44. Professor of Law, Loyola University of the South, 1936-44. *Member:* New Orleans, Louisiana State (Member, Board of Governors, 1942-43, 1944-45) and American Bar Associations.

Louis J. Darrah, born Hattiesburg, Mississippi, July 17, 1906; admitted to bar, 1932, Louisiana. Preparatory education, University of Mississippi and Loyola University of the South; legal education, Loyola University of the South (LL.B., 1932). *Fraternity:* Delta Theta Phi. *Member:* New Orleans, Louisiana State and American Bar Associations.

Edward B. Poitevent, born New Orleans, Louisiana, June 15, 1913; admitted to bar, 1937, Louisiana. Preparatory education, Tulane University (B.A., 1935); legal education, Tulane University (LL.B., 1937). *Member:* New Orleans, Louisiana State and American Bar Associations.

Ernest A. Carrère, Jr., born New Orleans, Louisiana, September 26, 1915; admitted to bar, 1938, Louisiana. Preparatory education, Tulane University; legal education, Tulane University (LL.B., 1938). *Fraternities:* Phi Delta Phi; Omicron Delta Kappa. *Member:* New Orleans, Louisiana State and American Bar Associations; Maritime Law Association of the United States; International Association of Insurance Counsel.

George Denègre, born New Orleans, Louisiana, October 10, 1925; admitted to bar, 1948, Louisiana. Preparatory education, Yale University (1943); legal education, Tulane University (LL.B., 1948). *Fraternities:* Phi Delta Phi; Order of Coif. *Member:* New Orleans, Louisiana State and American Bar Associations; Maritime Law Association of the United States.

Michael J. Moloney, Jr., born New Orleans, Louisiana, September 2, 1922; admitted to bar, 1950, Louisiana. Preparatory education, Tulane University; legal education, Tulane University (LL.B., 1950). *Fraternity:* Phi Delta Phi. Assistant Secretary and Ex-Officio Member of Council, Louisiana State Law Institute, 1958—. Instructor in Labor Law, Tulane University, University College, 1953-59. *Member:* New Orleans, Louisiana State (Secretary, 1957-58; 1958-59; Member, Board of Governors, 1959-60) and American Bar Associations.

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OCT 21 1962
HARRY M. HULL, Clerk

John V. Baus, born New Orleans, Louisiana, December 29, 1927; admitted to bar, 1951, Louisiana. Preparatory education, Louisiana State University and Tulane University (B.S., 1947); legal education, Tulane University (LL.B., 1951). *Fraternity:* Phi Delta Phi. *Member:* New Orleans, Louisiana State and American Bar Associations; Maritime Law Association of the United States; International Association of Insurance Counsel.

James M. Burlingame, born Great Falls, Montana, December 25, 1926; admitted to bar, 1951, Louisiana. Preparatory education, Tulane University (B.A., 1949); legal education, Tulane University (LL.B., 1950). *Fraternity:* Phi Alpha Delta. *Member:* New Orleans, Louisiana State and American Bar Associations.

Robert B. Acomb, Jr., born New Orleans, Louisiana, July 28, 1930; admitted to bar, 1953, Louisiana. Preparatory education, Tulane University (B.B.A., 1951); legal education, Tulane University (LL.B., 1953). *Fraternities:* Phi Delta Phi; Omicron Delta Kappa. *Member:* New Orleans, Louisiana State and American Bar Associations; Maritime Law Association of the United States.

Lucius F. Suthon, born New Orleans, Louisiana, July 24, 1928; admitted to bar, 1952, Louisiana. Preparatory education, Tulane University of Louisiana (B.A., 1950); legal education, University of Virginia (LL.B., 1952). *Member:* New Orleans, Louisiana State and American Bar Associations.

(This card continued)

144

C. A. 1857-62

...S, WALKER, WAECHTER, POITEVENT, CARRÈRE & DENÈGRE (Continued)

...s Rosen, II, born New Orleans, Louisiana, ... 29, 1925, admitted to bar, 1951, Louisiana. ...ary education, Isidore Newman School, ...leans, La. and Tulane University (A.B., ...egal education, Tulane University (LL.B., *Fraternity:* Phi Delta Phi. *Member:* New ... Louisiana State and American Bar Asso...

... L. Upton, born New Orleans, Louisiana, ...st 16, 1913; admitted to bar, 1950, Louisiana. ...ary education, Tulane University of Loui... ...egal education, Tulane University of Loui... (LL.B., 1950). *Fraternity:* Phi Delta Phi. ... New Orleans and Louisiana State Bar ...ations.

... W. Browne, Jr., born New Orleans, ..., April 14, 1933; admitted to bar, 1956, ... Preparatory education, Tulane Uni... Louisiana (B.A., 1954); legal education, ... University of Louisiana (LL.B., 1956). ...ities: Phi Delta Phi; Omicron Delta Kappa. ... New Orleans, Jefferson County, Louisiana ... American Bar Associations.

... Bernstein, born New Orleans, Louisiana, ...ary 12, 1930; admitted to bar, 1957, Louisi... Preparatory education, University of Ala... (B.S., 1952); legal education, Tulane Uni... (LL.B., 1957). *Fraternity:* Phi Delta ... Member, Student Board of Editors, Tulane ... Review, 1954-1956. *Member:* New Orleans, ... State and American Bar Associations.

... S. Sims, born New Orleans, Louisiana, ...mber 2, 1924; admitted to bar, 1951, Louisiana. ...ary education, Tulane University (B.S., ...egal education, Tulane University (LL.B., *Fraternity:* Phi Alpha Delta. *Member:* ...leans, Louisiana State and American Bar ...ations.

OF COUNSEL

...les Rosen (1872-1957)

... May (1876-1961)

ASSOCIATES

... J. Schulze, born New Orleans, Louisi... ...ruary 3, 1916; admitted to bar, 1938, Louisi... Preparatory education, Tulane University ... 1936); legal education, Tulane University ... 1938). *Fraternity:* Phi Delta Phi. *Mem...* New Orleans and Louisiana State Bar Asso...

... E. Hall, Jr., born New Orleans, Louisi... November 14, 1926; admitted to bar, 1952, ... Preparatory education, Tulane Univer... Louisiana (B.B.A., 1950); legal education, ... University of Louisiana (LL.B., 1952). ...ity: Phi Delta Phi. City Attorney's Office, ...leans, 1954-1956. *Member:* New Orleans, ... State and American Bar Associations.

... W. Lane, III, born Shreveport, Louisi... November 11, 1932; admitted to bar, 1959, Louisiana. Preparatory education, Tulane University (B.B.A., 1954); legal education, Tulane University (LL.B., 1959). *Fraternity:* Phi Delta Phi. Member, Tulane Moot Court Board. *Member:* New Orleans, Louisiana State and American Bar Associations.

John J. Weigel, born New Orleans, Louisiana, February 4, 1932; admitted to bar, 1956, Louisiana. Preparatory education, Louisiana State University; legal education, Tulane University (LL.B., 1956). *Fraternities:* Phi Delta Phi; Omicron Delta Kappa. *Member:* New Orleans, Louisiana State and American Bar Associations.

Donald L. King, born New Orleans, Louisiana, September 19, 1933; admitted to bar, 1956, Louisiana and U. S. District Court, Eastern District of Louisiana. Preparatory education, Tulane University (A.B., 1954); legal education, Tulane University (LL.B., 1956). *Fraternities:* Phi Beta Kappa; Omicron Delta Kappa; Phi Delta Phi. Member, Board of Editors, ...lane Law Review, 1954-1956. *Member:* New Orleans, Louisiana State and American Bar Associations.

James Larkin Selman, II, born New Orleans, Louisiana, June 24, 1934; admitted to bar, 1959, Louisiana. Preparatory education, University of Notre Dame and Tulane University (B.A., 1957); legal education, Tulane University (LL.B., 1959). *Fraternity:* Phi Delta Phi. *Member:* New Orleans and Louisiana State Bar Associations.

Charles K. Reasonover, born New Orleans, Louisiana, March 30, 1934; admitted to bar, 1960, Louisiana. Preparatory education, Louisiana State University (B.S., 1955); legal education, Tulane University (LL.B., 1960). *Fraternity:* Phi Delta Phi. Member, Board of Editors, Tulane Law Review, 1959-1960. *Member:* Louisiana State and American Bar Associations.

Thomas P. Walshe, Jr., born New Orleans, Louisiana, February 17, 1934; admitted to bar, 1958, Louisiana. Preparatory education, Loyola University (A.B., 1958); legal education, Loyola University (LL.B., 1958). *Fraternities:* Delta Theta Phi; Blue Key; Alpha Sigma Nu; Delta Epsilon Sigma. National President, Association of International Relations Societies, 1956-1957. *Member:* Louisiana State Bar Association.

Quintin T. Hardtner, III, born Shreveport, Louisiana, March 5, 1936; admitted to bar, 1961, Louisiana. Preparatory education, Tulane University of Louisiana (B.B.A., 1957); legal education, Tulane University of Louisiana (LL.B., 1961). *Fraternity:* Phi Delta Phi. *Member:* Louisiana State Bar Association.

Edmond C. Salassi, born New Orleans, Louisiana, September 5, 1933; admitted to bar, 1961, Louisiana. Preparatory education, Georgetown University, Tulane University of Louisiana and Centenary College (B.A., 1955); legal education, Tulane University

JONES, WALKER, WAECHTER, POITEVENT, CARRÈRE & DENÈGRE (Continued)

of Louisiana (LL.B., 1961). *Fraternities:* Omicron Delta Kappa; Phi Delta Phi. Chief Justice, Tulane Moot Court Board, 1960-1961. *Member,* [illegible] State and American Bar Associations.

REPRESENTATIVE CLIENTS: The Bank of New Orleans; The National Bank of Commerce in New Orleans; Brown's Velvet Dairy Products, Inc.; Chas. Keller, Inc.; The Louisiana Coca-Cola Bottling Co., Ltd.; Holsum Bakeries, Inc.; Keller Construction Corp.; Leon Israel & Bros., Inc.; McIlhenny Co.; Provit & Ford, Ltd., Inc.; Southern Pine Assn.; Southdown, Inc.; Standard Supply & Hardware Co.; Dr. G. H. Tichenor's Antiseptic Co.; Wham-Dixie La., Inc.; Liberty Mutual Insurance Co.; The Mutual Life Insurance Co. of New York; Henry, Gibbs & Co.; The Prudential Insurance Co. of America; The Travelers Indemnity Co.; The Travelers Insurance Co.; Western Casualty & Surety Co.; Austral Oil Co., Inc.; Francis A. Callery; Continental Oil Co.; Louisiana-Delta Offshore Corp.; John W. Mecom; Mobil Oil Co.; Texaco Inc.; Union Producing Co.; United Gas Pipe Line Co.; Canal Barge Co., Inc.; Central Gulf Steamship Corp.; Compania Maritima Unidas, S. A.; National Airlines, Inc.; New Orleans Public Belt Railroad; New Orleans Public Service, Inc.; Ryder System, Inc.

General Civil Practice Probate, Corporation and Real Estate Law

EDWARD A. KALINSKI

(Successor to Dreyfous & Kalinski)
1609 NATIONAL BANK OF COMMERCE BUILDING
NEW ORLEANS 12, LOUISIANA

Telephone JAckson 5-6441

Felix J. Dreyfous (1857-1946).

George A. Dreyfous (1894-1961).

Edward A. Kalinski, born Mobile, Ala., Feb. 14, 1913; adm. to bar, 1941, Louisiana. Prep. education, Loyola University in New Orleans; legal education, Tulane University. *Member:* Louisiana State and American Bar Associations.

ASSOCIATE

Bruce J. Borrello, born New Orleans, [illegible] September 19, 1932; admitted to bar, [illegible] isiana. Preparatory education, [illegible] University and A. and M. College (B.A. [illegible] legal education, Tulane University of [illegible] (LL.B., 1961). *Member:* Louisiana State Bar Association.

General Civil Practice, State and Federal Courts. Corporation, Real Estate, Oil and Gas, Probate, Estate and Banking Law

KEPPER, MOULIN & KEPPER

515 HIBERNIA BANK BUILDING
NEW ORLEANS 12, LOUISIANA

Telephone 524-4774

MEMBERS OF FIRM

James H. Kepper, Jr., born New Orleans, Louisiana, March 14, 1912; admitted to bar, 1935, Louisiana. Preparatory education, Tulane University (B.A., 1933); legal education, Tulane University (LL.B., 1935). *Fraternity:* Phi Beta Kappa. Member, Board of Editors, Tulane Law Review, 1933-35. *Member:* New Orleans and Louisiana State Bar Associations.

Albert E. Moulin, born New Orleans, Louisiana, November 6, 1889; admitted to bar, 1919, Louisiana. Education, Loyola University, New Orleans, La. (LL.B., 1919). Public Administrator, 1948-1950. *Member:* New Orleans and Louisiana State Bar Associations.

Stewart J. Kepper, born New Orleans, Louisiana, April 28, 1919; admitted to bar, 1942, Louisiana. Preparatory education, Tulane [illegible] (A.B., 1940); legal education, Tulane [illegible] (LL.B., 1942). *Fraternity:* Phi Delta [illegible] ber, 1940-1942 and Chairman, 1941-[illegible] Court Board, Tulane University. *Member:* [illegible] Orleans, Louisiana State and American Bar [illegible] ations.

ASSOCIATE

John M. Currier, born Knoxville, Tennessee, September 9, 1930; admitted to bar, 1959, Louisiana. Preparatory education, Tulane University of Louisiana (B.S. in Ch. E., 1955); legal education, University of Louisiana (LL.B., 1959). Fraternity: Phi Delta Phi. Special Counsel to the Attorney General, 1959—. *Member:* Louisiana State and American Bar Associations.

(This and continued)

Filed June 26, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

[Title omitted]

PLAINTIFFS' OPPOSITION TO MOTION OF WHITNEY NATIONAL BANK IN JEFFERSON PARISH TO INTERVENE AS A DEFENDANT.

Come now the plaintiffs, Bank of New Orleans & Trust Company and Guaranty Bank & Trust Company, and oppose the Motion of Whitney National Bank in Jefferson Parish to intervene as a defendant in these proceedings for the following reasons:

1. Whitney National Bank in Jefferson Parish is not the real party in interest in this controversy. Applicant is merely the corporate alter ego of Whitney National Bank of New Orleans and therefore should not be permitted to prosecute any action on its own behalf in this proceeding as a matter of right or permission; and said applicant cannot in any respect adequately represent the real interest involved, which is that of the Whitney National Bank of New Orleans to open and operate a new branch or branches in Jefferson Parish, Louisiana, in circumvention of *Section 36* of the National Bank Act.

Respectfully submitted,

EDWARD L. MERRIGAN
Attorney for Plaintiffs,
425 13th St., N.W.,
Washington, 4, D.C.

Filed June 21, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

[Title omitted]

DEFENDANT'S RESPONSE TO MOTION OF WHITNEY NATIONAL BANK IN JEFFERSON PARISH TO INTERVENE AS A DEFENDANT

Comes now the defendant Comptroller of the Currency, through his undersigned counsel, and states to the Court that he has no objection to the granting of the motion of Whitney National Bank in Jefferson Parish to intervene as a defendant in this action.

/s/ JOSEPH D. GUILFOYLE,
Acting Assistant Attorney General.

/s/ DONALD B. MACGUINEAS,
/s/ DAVID V. SEAMAN,
Attorneys, Department of Justice,
Attorneys for Defendant.

Of Counsel:

DAVID C. ACHESON,
United States Attorney

Filed June 26, 1962

STATE OF LOUISIANA,
Parish of Orleans.

Before me the undersigned authority, personally came and appeared: MORGAN L. WHITNEY, who being duly sworn did depose and say: That he is of full age, a resident of the City of New Orleans, Vice President of the Whitney National Bank of New Orleans and member of the Board of Directors of the Louisiana Bankers Association; that:

(1) he attended a special meeting of the Board of Directors of the Louisiana Bankers Association held at Baton Rouge, January 24, 1962 called to consider a so-called Uniform State Bank Holding Company Bill which has been introduced in the Louisiana Legislature as House Bill No. 1221 (See Exhibit A attached), the passage of which is now being strenuously urged by Plaintiff, Bank of New Orleans & Trust Co. (see telegrams of Lawrence A. Merrigan, President, Exhibits B and C);

(2) at said meeting a resolution was offered by John Oulliber, President of National Bank of Commerce in New Orleans, to amend said House Bill No. 1221 by adding thereto a subsection 5 to Section 3 which would specifically prevent Whitney National Bank of Jefferson Parish, though completely organized, to commence business whether or not a certificate to commence business has been received from the Comptroller (see Exhibit D attached).

(3) Said resolution proposed by Mr. Oulliber was adopted by a vote of four to one. Two of the members voting in favor of the amendment were Lawrence A. Merrigan, President of plaintiff, Bank of New Orleans and Trust Company and Clebert C. Smith, Director of the National Bank of Commerce in Jefferson Parish and an Executive Vice President of National Bank of Commerce in New Orleans.

MORGAN L. WHITNEY.

Sworn to and subscribed before me at New Orleans, La., this 25 day of June, 1962.

BARTHOLOMEW P. SULLIVAN, JR.
Notary Public.

HOUSE BILL No. 1221—

By Mr. Angelle (By Request):

AN ACT

To define the bank holding company, to prohibit the formation of new bank holding companies, and to control the future expansion of existing bank holding companies and of their subsidiaries.

SECTION 1. DECLARATION OF POLICY

It is declared to be the policy of this State to protect and to foster the growth of the independent unit bank, and institution whose ownership and origins are grounded in the local community and whose activities are bound up with local economic and social organizations; to prevent the undesirable concentration of control in the banking field to the detriment of the public interest; to insure effective competition among all banking institutions; and, to accomplish these objectives by prohibiting the formation of new banking holding companies and the acquisition of control by whatever means of additional banking institutions by existing bank holding companies and by their subsidiaries.

SECTION 2. DEFINITIONS.

(a) "Bank holding company" means any company, including a bank, (1) which directly or indirectly owns, controls, or holds with power to vote, 15 per centum or more of the voting shares of any bank, or (2) which controls in

The State Bank Commissioner shall administer and carry out the provisions of this Act and may issue such regulations and orders as may be necessary to discharge this duty and to prevent evasions of the Act.

SECTION 6. SAVINGS CLAUSE.

Nothing herein contained shall be interpreted or construed as approving any act, action, or conduct which is or has been or may be in violation of any existing law, nor shall anything herein contained constitute a defense to any action, suit or proceeding pending or hereafter instituted on account of any prohibited antitrust or monopolistic act, action, or conduct.

SECTION 7. SEPARABILITY.

If any provision of this Act or the application of such provision to any person or circumstance, shall be held invalid, the remainder of the Act, and the application of such provision to persons or circumstancesother than those to which it is held invalid, shall not be affected thereby.

151

a bank holding company. Notwithstanding the foregoing, (A) no company shall be a bank holding company by virtue of its ownership or control of shares acquired by it in connection with its underwriting of securities and which are held only for such period of time as will permit the sale thereof upon a reasonable basis, and (B) no company formed for the sole purpose of participating in a proxy solicitation shall be a bank holding company by virtue of its control of voting rights of shares acquired in the course of such solicitation.

(b) "Company" means any corporation, business trust, partnership, joint venture, association, or similar organization ~~doing business in this State,~~ but shall not include (1) any corporation the majority of the shares of which are owned by the United States or by any State, or (2) any corporation of community chest, fund, or foundation organized and operated exclusively for religious, charitable, or educational purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation.

(c) "Bank" means any commercial bank, savings bank, trust company or similar organization doing business in this State.

its control of voting rights of shares acquired in the course of such solicitation.

(b) "Company" means any corporation, business trust, partnership, joint venture, association, or similar organization ~~doing business in this State~~, but shall not include (1) any corporation the majority of the shares of which are owned by the United States or by any State, or (2) any corporation of community chest, fund, or foundation organized and operated exclusively for religious, charitable, or educational purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation.

(c) "Bank" means any commercial bank, savings bank, trust company or similar organization doing business in this State.

(d) "Subsidiary," with respect to a specified bank holding company, means (1) any company 15 per centum or more of whose voting shares (excluding shares owned by the United States or by any company wholly owned by the United States) is owned or controlled by such bank holding company; or (2) any company the election of a majority of whose directors is controlled in any manner by such bank holding

company; or (3) any company 16 per centum or more of whose voting shares are held by trustees for the benefit of the shareholders or members of such bank holding company.

(e) The term "successor" shall include any company which acquires directly or indirectly from a bank holding company shares of any bank, when and if the relationship between such company and the bank holding company is such that the transaction effects no substantial change in the control of the bank or beneficial ownership of such shares of such bank.

SECTION 3. PROHIBITIONS UPON ACQUISITIONS OF BANK SHARES OR ASSETS.

It shall be unlawful (1) for any action to be taken which results in a company or a bank becoming a bank holding company as defined in this Act; (2) for any bank holding company or subsidiary thereof to acquire direct or indirect ownership or control of any voting shares of any bank if, after such acquisition, such company or subsidiary will directly or indirectly own or control more than 5 per centum of the voting shares of such bank; (3) for any bank holding company or subsidiary thereof to acquire all or substantially all of the assets of a bank; or (4) for any bank holding company or subsidiary thereof to merge or consolidate with any other bank holding company or any subsidiary thereof. Notwithstanding the foregoing, this prohibition shall not apply to additional shares acquired by a bank holding company in a bank in which

12 BANK SHARES OR ASSETS.

13 It shall be unlawful (1) for any action to be taken which
14 results in a company or a bank becoming a bank holding
15 company as defined in this Act; (2) for any bank holding
16 company or subsidiary thereof to acquire direct or indirect
17 ownership or control of any voting shares of any bank if,
18 after such acquisition, such company or subsidiary w... directly
19 or indirectly own or control more than 5 per centum of the vot-
20 ing shares of such bank; (3) for any bank holding company or
21 subsidiary thereof to acquire all or substantially all of the as-
22 sets of a bank; or (4) for any bank holding company or sub-
23 sidiary thereof to merge or consolidate with any other bank
24 holding company or any subsidiary thereof. Notwithstanding
25 the foregoing, this prohibition shall not apply to additional
26 shares acquired by a bank holding company in a bank in which
27 such bank holding company owned or controlled a majority
28 of the voting shares prior to such acquisition.

29 SECTION 4. PENALTIES.

30 Any bank, bank holding company, company, or any subsid-
31 iary of any of them which willfully violates any provision
32 of this Act, or any regulation or order issued by the State

Bank Commissioner pursuant thereto, shall upon conviction be fined not less than $500 nor more than $1,000 for each day during which the violation continues. Any individual who willfully participates in a violation of any provision of this Act shall upon conviction be fined not less than $1,000 nor more than $5,000 or imprisoned not more than one year, or both.

SECTION 5. ADMINISTRATION.

The State Bank Commissioner shall administer and carry out the provisions of this Act and may issue such regulations and orders as may be necessary to discharge this duty and to prevent evasions of the Act.

SECTION 6. SAVINGS CLAUSE.

Nothing herein contained shall be interpreted or construed as approving any act, action, or conduct which is or has been or may be in violation of any existing law, nor shall anything herein contained constitute a defense to any action, suit or proceeding pending or hereafter instituted on account of any prohibited antitrust or monopolistic act, action, or conduct.

SECTION 7. SEPARABILITY.

If any provision of this Act or the application of such provision to any person or circumstance, shall be held invalid, the remainder of the Act, and the application of such provision to persons or circumstancesother than those

EXHIBIT B

DOMESTIC SERVICE	
Check the class of service desired, otherwise this message will be sent as a fast telegram	
TELEGRAM	
DAY LETTER	
NIGHT LETTER	

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WESTERN UNION
TELEGRAM

W. P. MARSHALL, PRESIDENT

1206 (1-33)

INTERNATIONAL SERVICE	
Check the class of service desired, otherwise the message will be sent at the full rate	
FULL RATE	
LETTER TELEGRAM	
SHORE SHIP	

NO. WDS.	CL. OF SVC.	PD. OR COLL.	CASH NO.	CHARGE TO THE ACCOUNT OF	TIME FILED

Send the following message, subject to the terms on back hereof, which are hereby agreed to

C. A. Henricks Jr, President

Guaranty Bank & Trust Co.

Gretna La.

If your primary interest is to preserve the independent unit banks in Louisiana and protect them against the unfair advantage of State wide branch banking, please immediately wire or call your representative in the State Legislature. Support of House Bill 1221 will guarantee maintenance of the unit independent banking system. Present State laws do not permit State Wide branch banking. House Bill 1221 prohibits State Wide branch banking through holding companies. The experience of those States permitting branch banking proves conclusively that independent banking cannot compete and results in the reduction of the number of banks in the State. I strongly urge your support of House Bill 1221. The matter is before the house of Representatives at this time.

(Signed) Lawrence A. Merrigan, President

Bank of New Orleans and Trust Company

EXHIBIT D

PROPOSED AMENDMENT TO SECTION 3 OF HOUSE BILL NO. 1221

Add new Sub-section (5) as follows:

"(5) for any bank holding company or subsidiary thereof to open for business any bank not now open for business whether or not a charter, permit, license or certificate to open for business has already been issued."

Filed June 26, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

[Title omitted]

CITY OF WASHINGTON,
District of Columbia, ss:

Lawrence A. Merrigan, being duly sworn, deposes and says:

1. I am the President of plaintiff, Bank of New Orleans & Trust Company, and I submit this affidavit for the following reasons and to bring the following facts before the Court:

(a) I want to verify that I have read the complaint herein and the affidavit of plaintiffs' counsel submitted in support of the motion for preliminary injunction, and to the best of my knowledge, information and belief all allegations and matters therein set forth are true and correct.

(b) I want to verify for this Court also that unless the Court grants the preliminary injunction prayed for herein, plaintiff, Bank of New Orleans & Trust Company, will suffer severe, permanent and irreparable damage for which it has no adequate remedy. As stated in the complaint, to permit the establishment of a branch of the Whitney National Bank of New Orleans in Jefferson Parish, Louisiana at a time when this plaintiff and all state banks similarly situated are confined by law to the limits of Orleans Parish would cause vast damage to our property and business, principally as regards the very substantial banking business of this bank emanating from sources in Jefferson Parish. We would be confronted with what we believe to be a new, impossible-to-meet competition from the combined resources of the largest bank in Louisiana.

(c) I have received from the State Bank Commissioner of Louisiana and file herewith copies of the following documents:

(i) *copy of letter* dated June 21, 1962, written by the the said State Bank Commissioner of Louisiana to the

Chairman of the Board of Governors of the Federal Reserve System.

(ii) *certified copy of letter opinion* of the Attorney General of Louisiana, J. P. F. Gremillion, dated June 13, 1962, addressed to the State Bank Commissioner of Louisiana.

(d) I have received from plaintiffs' attorney herein, who obtained same from the Executive Office of the President, copy of Memorandum, addressed on March 28, 1962, to the Attorney General, the Comptroller of the Currency and other officials of the federal government, which Memorandum purports to establish a Committee on Financial Institutions, to include the defendant in this action. A copy of said Memorandum of the President of the United States is filed herewith.

(e) Plaintiffs' attorneys have received and I file herewith copy of letter of the Federal Reserve Board of Governors, dated June 25, 1962.

(f) I understand the Comptroller herein has refused to make available copies of any letters which passed between the Comptroller's office and the Federal Reserve Board, or between the Comptroller's offices and attorneys or representatives of the Whitney National Bank or Whitney Holding Corporation with reference to the matters involved in this action.

The Federal Reserve Board, however, has released to us a copy of a letter filed in 1961 with said Board by the Comptroller of the Currency, and said letter is filed herewith.

LAWRENCE A. MERRIGAN.

Sworn to and subscribed before me this 26th day of June, 1962.

ROSE W. DENNIS
Notary Public.

My Commission Expires May 14, 1965.

Received June 14, 1962

PLAINTIFFS' EXHIBIT E

STATE OF LOUISIANA
Department of Justice
Baton Rouge

Jack P. F. Gremillion
Attorney General

June 13, 1962.

Mr. J. W. Jeansonne,
State Bank Commissioner,
State Capitol,
Baton Rouge, Louisiana.

Dear Commissioner Jeansonne:

This is in reference to your request for an opinion as to (1) whether there is any prohibition in our law of the formation of a national bank holding company by shareholders of a national bank, and (2) if there is no prohibition, whether a national bank holding company may own controlling interest in and operate a branch bank in a parish other than the domicile of the holding company.

We have been unable to find any law which would prohibit the organization and incorporation of such a holding company in the State of Louisiana. In our opinion, under Louisiana law, such a corporation would be considered, for purposes of incorporation, as any other corporation. In fact, I am sure you will recall that some months ago we verbally discussed the matter stated by the first question you pose. We researched the law and concluded in our verbal discussions that there were no violations of Louisiana law, nor prohibitions, that would prevent a national bank from organizing a holding company. We so advised you and we wish now to reiterate our affirmation.

We issued an opinion to you on August 10, 1961, relating to the formation of the Whitney Holding Corporation and the creation by it of the Crescent City National Bank, but that opinion dealt specifically with the question of exemption of issuance of the securities of the Holding Corporation from the provisions of the Louisiana Securities Law, R.S.

51:701, et seq. We held that such securities were exempt within the meaning of R.S. 51:705.

With reference to the second portion of your request, we wish to advise as follows:

R.S. 6:54 provides as follows:

> "All banks, savings banks, and trust companies having a capital of one hundred thousand dollars or more may open and maintain a branch office or branch offices in parishes in which there are no state banks, savings banks, and trust companies.
>
> "Not more than one branch office shall be opened in any one parish other than the parish of domicile, and such branch office shall be included in the number of branch offices authorized by Chapters 3 and 4 of this Title. The Branch offices may carry on and conduct all usual transactions authorized by this Title for branch offices.
>
> "No branch office shall be opened without a certificate of authority from the commissioner."

It is evident from a reading of the above statute that the same is intended to prohibit branch banks outside of the Parish in which the main office of a bank is domiciled. The exemptions provided in R.S. 6:55 (the Parishes of Allen, Calcasieu, Cameron, or Jefferson Davis) were made to maintain the status quo of those banks at the time of the passage of these laws.

Our branch banking laws in the State of Louisiana emanated from the well-established belief that the various communities and political sub-divisions of the State can be best served by local banks, which would obviously have peculiar knowledge and information concerning the people and community of the various areas served, and of the belief that such local banks would have a greater interest in the welfare of the specific community or area. It is also generally accepted that a bank, properly operated and regulated, can be the best industry a community may have. It follows, therefore, that it is to the best interest of a community to have such an important institution owned and operated by the citizens of said community, which of course will have a greater interest in the development, growth, and welfare of said community.

Under the Federal law, 12 U.S.C.A. 36(c), a *national* banking association, with the approval of the Comptroller of the Currency, may establish new branches at any point within a state in which said Association is situated, if such establishment and operation are at the time authorized to state banks by state law. Although we can find no prohibition against the establishment of a bank holding company, we are of the firm opinion that a banking operation may not accomplish by an indirect means, such as a holding company device, what is prohibited directly by law. There is a general principle of law that corporate entities must be disregarded where they are made the implements for avoiding a clear legislative purpose. To allow the establishment of a bank holding company to avoid and circumvent the branch banking laws of our State is, in our opinion, prohibited, if not by the letter, by the spirit of our law.

Evidence of the legislative intent, in this connection, in our opinion, is contained in House Bill No. 1221, which has been introduced and is pending in the Legislature at this time. This Act has for its purpose the prohibition of the formation of bank holding companies. It is interesting to note Section 1 of said Bill, which is a declaration of policy:

> "It is declared to be the policy of this State to protect and to foster the growth of the independent unit bank, an institution whose ownership and origins are grounded in the local community and whose activities are bound up with local economic and social organizations; to prevent the undesirable concentration of control in the banking field to the detriment of the public interest; to insure effective competition among all banking institutions; and, to accomplish these objectives by prohibiting the formation of new banking holding companies and the acquisition of control by whatever means of additional banking institutions by existing bank holding companies and by their subsidiaries."

Also, Section 6 of said House Bill No. 1221 provides:

> "Nothing herein contained shall be interpreted or construed as approving any act, action, or conduct which is or has been or may be in violation of any existing law, nor shall anything herein contained constitute a defense to any action, suit or proceeding pending or

hereafter instituted on account of any prohibited anti-trust or monopolistic act, action, or conduct."

It is the opinion of this office, therefore, that a bank holding company may not circumvent the branch bank laws of our State by the acquisition of a controlling interest in a subsidiary which is located in a parish other than the domicile of the parent company.

Sincerely yours,

JACK P. F. GREMILLION,
Attorney General.

JPFG:emc

STATE OF LOUISIANA,
Parish of East Baton Rouge.

This is to certify that the above and foregoing is a true and correct photostatic copy of the opinion of the Attorney General, rendered June 13, 1962, addressed to Mr. J. W. Jeansonne, State Bank Commissioner, and signed by Jack P. F. Gremillion, Attorney General.

J. W. JEANSONNE,
State Bank Commissioner.

Sworn to and subscribed before me this 25th day of June, 1962.

JOSEPH H. KAVANAUGH,
Notary Public.

Filed June 26, 1962

PLAINTIFFS' EXHIBIT F

STATE OF LOUISIANA
State Banking Department
Baton Rouge 4, Louisiana

June 21, 1962

Honorable William McChestney Martin, Jr.,
Chairman,
Board of Governors of the
Federal Reserve System,
Washington 4, D.C.

Dear Mr. Chairman:

I am taking the liberty of enclosing an opinion from our Attorney General in the State of Louisiana that is self-explanatory.

As Commissioner of the Banking Department in the State of Louisiana, I earnestly request that a re-hearing be granted in the matter of approving the plan of the Whitney Holding Corporation, New Orleans, Louisiana, under your ruling of May 3, 1962. In my opinion this ruling seriously affects all State Banks in Louisiana.

On behalf of my Department, I would like to personally appear and voice my opposition. If it is at all feasible I would appreciate the new hearing to be held either in New Orleans or Baton Rouge, Louisiana, at a time convenient to your Board.

Thanking you for your consideration, I remain

Sincerely yours,

J. W. JEANSONNE
State Bank Commissioner.

JWJ/bc
Enclosure

PLAINTIFFS' EXHIBIT H

Received in Records Section October 12, 1961

TREASURY DEPARTMENT
Comptroller of the Currency
Washington 25

October 11, 1961

Board of Governors of the
Federal Reserve System
Washington 25, D.C.

Gentlemen:

This will have reference to your letter of July 24, 1961, in which you advise that an application has been filed on behalf of Whitney Holding Corporation (a proposed corporation), New Orleans, Louisiana, to the Board of Governors for prior approval by the Board of action to become a bank holding company through the acquisition of all the voting shares to be issued of each of the following banks: Crescent City National Bank (into which would be consolidated the existing Whitney National Bank of New Orleans, and with the name Whitney National Bank of New Orleans), New Orleans, Louisiana, and Whitney National Bank in Jefferson Parish, Louisiana, which has been approved and is now in organization.

In determining whether or not to recommend your approval of this transaction careful consideration has been given to the following factors: (1) the financial history and condition of the applicant and the banks concerned; (2) the prospects of the applicant and the banks concerned; (3) the character of the management of the applicant and the banks concerned; (4) the convenience, needs and welfare of the communities and the area concerned; and (5) whether or not the effect of the proposed transaction for which approval is desired would be to expand the size or extent of the bank holding company system involved beyond limits consistent with adequate and sound banking, the public interest, and the preservation of competition in the field of banking.

In view of the favorable conditions disclosed by this study it is recommended that you give your approval to this application.

At your request we shall be pleased to discuss in detail the various aspects upon which this recommendation is based.

Sincerely,

RAY M. GIDNEY,
Comptroller of the Currency.

PLAINTIFF'S EXHIBIT I

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM
Washington 25, D.C.

June 25, 1962.

Edward L. Merrigan, Esquire,
425 - 13th Street, N.W.,
Washington 4, D.C.

Dear Mr. Merrigan:

With your letter dated June 13, 1962, you filed with the Board of Governors, on behalf of three banks located in Louisiana, a Petition for Reconsideration by the Board of its Order of May 3, 1962 (1962 Federal Reserve Bulletin 560), under the Bank Holding Company Act of 1956, permitting Whitney Holding Corporation to become a bank holding company by acquiring substantially all of the voting stock of a bank in New Orleans, Louisiana, and a bank in Jefferson Parish, Louisiana. The Petition requested that the Board revoke its Order of May 3, 1962 and "grant a rehearing herein and after reconsideration by appropriate Order deny the application of the Whitney Holding Corporation."

A Notice of Receipt of the Application on Behalf of Whitney Holding Corporation was published in the Federal Register on July 28, 1961 (26 Federal Register 6792), which provided an opportunity for submission of comments and views regarding the proposed acquisitions. Later, pursuant to Order published in the Federal Register on December 23, 1961 (26 Federal Register 12312), a public proceeding with respect to said Application was held before the Board on January 17, 1962 to provide a further opportunity for the expression of views and opinions by interested persons. The banks represented by you did not submit or express any

comments, views, or opinions. Most of the actions contemplated by the Whitney Reorganization Program, including the acquisitions of stock approved by the Board in its Order of May 3, 1962, were completed, according to information received by the Board, during May 1962, and, as indicated above, your clients' Petition for Reconsideration was submitted to the Board with your letter dated June 13, 1962.

Subparagraph (6) of section 262.2(f) of the Rules of Procedure of the Board of Governors (12 Code of Federal Regulations 262.2(f)(6)), relating to "Bank Holding Company and Merger Applications", reads as follows:

> "After action by the Board on an application the Board will not grant any request for reconsideration of its action, unless the request presents relevant facts that, for good cause shown, were not previously presented to the Board, or unless it otherwise appears to the Board that reconsideration would be appropriate."

The Board has considered the reasons advanced in the Petition for Reconsideration. To a considerable extent, these are based upon allegations that the Whitney Reorganization Program was not in conformity with applicable provisions of Federal statutes. It is also alleged that the Board's action "will unnecessarily place into the hands of federally chartered banks a powerful and unfair competitive advantage over State banks . . . ." In the judgment of the Board, those arguments are without substantial merit. In addition, they relate largely to an alleged violation of provisions of the National Bank Act, which is administered by the Comptroller of the Currency, an official of the United States Treasury Department.

In its consideration of the Petition, the Board has also taken into consideration the fact that the Petitioners had ample opportunity to present relevant facts, views, and arguments to the Board during the pendency of the Whitney Holding Corporation proceeding and failed to make any presentation until after the proceeding had terminated, the Board's Order of approval had been issued, and most of the steps in the Reorganization Program had been completed. For the foregoing reasons, the Petition for Reconsideration, Revocation, and Rehearing is denied.

As you are aware, section 9 of the Bank Holding Company Act (12 U.S.C. 1848) relates to judicial review of orders of

the Board of Governors under that Act. Section 9 confers a right to such review on "Any party aggrieved by an order of the Board under this Act". In the event your clients should seek judicial review of the Board's Order in the Whitney matter, the question whether they fall within the quoted description and therefore are entitled to a judicial review is, of course, a question for determination by the United States Court of Appeals having jurisdiction.

In your letter to the Board dated June 18, 1962, you requested access to the letter of October 11, 1961 from Comptroller of the Currency Ray M. Gidney to the Board of Governors, expressing the views and recommendations of the Comptroller on the Whitney Holding Corporation's application, pursuant to section 3(b) of the Bank Holding Company Act (12 U.S.C. 1842(b)). The Board has granted this request, and the Comptroller's letter will be made available for your inspection at your convenience.

Very truly yours,

MERRITT SHERMAN,
Secretary.

Filed June 26, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

[Title omitted]

Now comes The Bank of Louisiana in New Orleans and respectfully moves the court for leave to intervene as a plaintiff in this action to join with the other plaintiffs herein in seeking the relief prayed for in the original complaint.

The reasons for this motion to intervene are as follows:

(1) Plaintiffs in this action seek a declaratory judgment that the Comptroller of the Currency is prohibited by law from issuing to The Whitney National Bank of New Orleans, and/or the Whitney Holding Corporation and or Whitney National Bank of Jefferson Parish, a certificate of authority authorizing them, or any of them, to establish new branch bank facilities of the Whitney National Bank of New Orleans in Jefferson Parish through the medium of

Whitney Holding Corporation. The Bank of Louisiana in New Orleans is a State bank with its main office in New Orleans, which, like the original plaintiffs herein, is not permitted by law to expand into Jefferson Parish and will therefore be seriously and adversely affected by action of the Comptroller of the Currency in permitting the Whitney National Bank in New Orleans an unfair competitive advantage over State banks similarly situated;

(2) The relief sought by Mover, the Bank of Louisiana in New Orleans, for permission to intervene, as set forth in the attached pleadings, involve the same questions of law and fact as those involved in the main action;

(3) The interests of Mover for intervention may not be properly represented and Mover will be bound by any final judgment rendered in this action;

(4) Intervention by Mover will not delay these proceeding.

G. Harrison Scott,
Civic Center Building,
New Orleans, Louisiana.

Filed June 26, 1962

Exhibit J

United States District Court for the District of Columbia

Civil Action No. 1857-62

[Title omitted]

Petition of the Bank of Louisiana in New Orleans, Intervening Plaintiff, for Declaratory Judgment and Injunctive Order.

The Bank of Louisiana in New Orleans, for its complaint in intervention as a party plaintiff, alleges:

1. The Bank of Louisiana in New Orleans is a banking corporation existing under the laws of the State of Louisiana, with its main banking offices in the City of New Orleans, State of Louisiana.

2. The Bank of Louisiana in New Orleans has total assets of approximately $10,000,000.00 and, like original plaintiffs herein, draws some business from residents of the Parish of Jefferson.

3. This intervening plaintiff believes and alleges that the so-called Whitney National Bank Reorganization Program constitutes nothing more nor less than a device for the evasion of federal and state laws prohibiting the establishment of branch banks in parishes beyond the parish of the bank's main office, which, if permitted, will directly adversely affect the business and property of this intervening plaintiff.

Plaintiff herein reiterates as though copied herein in extenso, the allegations of fact contained in the original complaint filed herein, particularly Paragraphs 7 through 17.

4. The Attorney General for the State of Louisiana, in answer to inquiries by the State Banking Commissioner, for an opinion as to the legality of such a bank holding company plan, has rendered as his opinion that "It is the opinion of this office, therefore, that a bank holding company may not circumvent the branch bank laws of our State by the acquisition of a controlling interest in a subsidiary which is located in a parish other than the domicile of the parent company."

WHEREFORE, the Bank of Louisiana in New Orleans prays that the court enter judgment herein declaring and adjudging that the Comptroller of the Currency is prohibited by law from issuing to The Whitney National Bank of New Orleans and/or the Whitney Holding Corporation and/or The Whitney National Bank of Jefferson, a certificate of authority authorizing them, or any of them, to establish new branch bank facilities known as The Whitney National Bank in Jefferson Parish or otherwise in the Parish of Jefferson, Louisiana, and in order to prevent irreparable injury to this plaintiff, joins with the original plaintiffs herein, requesting that this Court grant a preliminary injunction and ultimately a permanent injunction restraining and enjoining the Comptroller of Currency from issuing a certificate or certificates authorizing the establishment of new branch bank facilities by the Whitney National Bank or Whitney Holding Corporation or Whitney National

Bank of Jefferson Parish, or in any other name in the Parish of Jefferson, State of Louisiana.

Intervening plaintiff prays for such general and other equitable relief.

G. HARRISON SCOTT,
Civic Center Building,
New Orleans, Louisiana.

Filed June 26, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

[Title omitted]

MOTION FOR VOLUNTARY DISMISSAL BY MERCHANTS TRUST AND SAVINGS BANK

NOW COMES Merchants Trust & Savings Bank, through its undersigned counsel, and pursuant to Rule 41(a)(1)(i), Federal Rules of Civil Procedure, and without prejudice to the rights of plaintiffs, Bank of New Orleans and Trust Company and Guaranty Bank and Trust Company, hereby dismisses this action in its own behalf only and without prejudice for the reasons set forth in the affidavit of counsel for the said Bank attached hereto.

EDWARD L. MERRIGAN,
425 13th Street, N.W.
Washington 4, D.C.,
Attorney for Plaintiffs.

PAUL F. ROGYOM,
P.O. Box 184, Kenner, Louisiana,
Attorney for Merchants Trust and Savings Bank.

Filed June 26, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

[Title omitted]

AFFIDAVIT IN SUPPORT OF APPLICATION FOR WITHDRAWAL OR DISCONTINUANCE OF SUIT BY PLAINTIFF, MERCHANTS TRUST AND SAVINGS BANK.

STATE OF LOUISIANA,
Parish of Orleans.

Before me, the undersigned Notary Public, personally came and appeared:

PAUL F. ROGERS who, being duly sworn, deposes and says:

(1) That I am an attorney at law and I have appeared in this action as counsel on behalf of plaintiff, Merchants Trust & Savings Bank of Kenner, Louisiana. I submit this affidavit in support of the motion to dismiss, withdraw and be dropped as a party plaintiff filed on behalf of said Merchants Trust & Savings Bank of Kenner, Louisiana, (Merchants).

(2) When the complaint in this action was filed on June 9, 1962 I was duly authorized to appear as counsel in that action for the said plaintiff, Merchants Trust & Savings Bank. Said plaintiff then believed, and presently believes, that the allegations contained in the complaint are true and that Merchants will, if the Comptroller of the Currency grants a certificate authorizing the opening of a branch of the Whitney National Bank, suffer damage to its business. However, the Whitney National Bank has injected into this case irrelevant, immaterial and, in some respects, inaccurate statements regarding Merchants which obscure the factual and legal issues presented in this case for determination. Upon reflection, the officers and directors of Merchants for business reasons have concluded that such immaterial assertions concerning Merchants should be eliminated from this suit and desire to accomplish this result by withdraw-

ing as a party plaintiff herein so that the case may proceed on the cause of action set forth on behalf of the remaining plaintiffs.

For the reasons hereinabove stated, it is therefore respectfully prayed that this Court grant the application of plaintiff, Merchants Trust and Savings Bank to withdraw, dismiss and be dropped as a party plaintiff without prejudice to the rights of the remaining plaintiffs and without prejudice to any rights of Merchants.

PAUL F. ROGYOM.

Sworn to and subscribed before me, this 22nd day of June, 1962.

CHARLES A. BYRNE,
Notary Public.

Filed June 27, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

[Title omitted]

MOTION FOR TEMPORARY RESTRAINING ORDER

Now comes the plaintiffs by their undersigned attorney and move this Court as follows:

To grant forthwith and without notice to the defendant personally a temporary restraining order restraining and enjoining the defendant, his agent and employees from issuing a Certificate of Authority, pursuant to *Title 12 U.S.C. § 27* or otherwise, authorizing the opening and operation of bank facilities in Jefferson Parish, Louisiana to be known as the Whitney National Bank in Jefferson Parish, pending a hearing on and disposition of plaintiffs' Motion for Preliminary Injunction filed herein on June 9, 1962, and scheduled by the Court for hearing on July 6, 1962; and for cause refers to the Complaint herein, the affidavit of Lawrence A. Merrigan, President of plaintiff, Bank of

New Orleans and Trust Company, dated June 26, 1962, together with affidavits of the attorney for plaintiffs, dated June 8 and 27, 1962.

EDWARD L. MERRIGAN,
Attorney for Plaintiffs,
425 13th Street, N.W.,
Washington, D. C.

Filed June 27, 1962

CITY OF WASHINGTON,
District of Columbia, ss:

Edward L. Merrigan, being duly sworn, deposes and says:

I am the attorney for plaintiffs herein. At or about the time I filed the complaint and Motion for Preliminary Injunction herein on June 9, 1962, I advised Mr. Robert Bloom, General Counsel to defendant, the Comptroller of the Currency, and Mr. Haddon of the United States Attorney's Office that I likewise intended immediately to apply for a Temporary Restraining Order to enjoin the defendant Comptroller from issuing the Certificate of Authority in issue in this action until the Motion for Preliminary Injunction could be heard by the Court and determined.

Mr. Bloom, acting for the Comptroller, thereupon committed the defendant as follows: The defendant voluntarily undertook and agreed not to issue any Certificate of Authority authorizing the opening and operation of banking facilities in Jefferson Parish, Louisiana, in the name of Whitney National Bank until this Court had heard and determined the said Motion for Preliminary Injunction. I was assured it would thus be unnecessary for plaintiffs to apply for a Temporary Restraining Order herein.

Acting upon this assurance, plaintiffs did not apply for a Restraining Order.

The Court, on June 26, 1962, upon its own motion and with agreement of the attorneys for plaintiffs and defendant, set down the said Motion for Preliminary Injunction for July 6, 1962 at 10 a.m.

On behalf of plaintiffs, I intend to ask the Court, because of the irreparable damage which otherwise would result, to compel the defendant herein to honor his commitment

to continue to withhold the certificate in issue until the motion for preliminary injunction comes on to be heard on July 6, 1962.

EDWARD L. MERRIGAN.

Sworn to and subscribed before me this 27th day of June, 1962.

[Copy Illegible]
Notary Public.

My Commission Expires January 31, 1967.

Filed June 27, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

[Title omitted]

TEMPORARY RESTRAINING ORDER

Upon consideration of the Motion for Temporary Restraining Order filed herein on the 27th day of June, 1962, and the Complaint herein filed on the 9th day of June, 1962, the allegations of which were verified by affidavit of Lawrence A. Merrigan, President of plaintiff, Bank of New Orleans and Trust Company, dated June 26, 1962, together with the affidavits of the attorney for plaintiffs, dated June 8 and 27, 1962, it appears to the Court

That the defendant herein, the Comptroller of the Currency, heretofor voluntarily agreed and undertook not to issue any Certificate of Authority, pursuant to *Title 12, U.S.C. § 27*, authorizing the opening and operation of bank facilities in Jefferson Parish, Louisiana to be known as the Whitney National Bank in Jefferson Parish until after this Court had rendered its decision on plaintiffs' Motion for Preliminary Injunction;

That said Motion for Preliminary Injunction was scheduled to be heard by the court on June 27, 1962, but at the suggestion of the Court and by agreement of the attorneys for plaintiffs and defendant herein, the hearing on said motion has been adjourned to July 6, 1962 at 10 o'clock a.m.;

That the defendant herein has advised the Court he is not inclined voluntarily to stay further the issuance of the aforesaid Certificate pending the determination of said Motion for Preliminary Injunction, and that defendant might, if not temporarily restrained, issue his Certificate authorizing the opening and operation of the aforementioned bank facilities in Jefferson Parish, Louisiana before this Court can hear and determine the said Motion for Preliminary Injunction;

That upon issuance of any such Certificate, such bank facilities may be opened and operated forthwith by the applicant for such certificate, and that after the issuance of such certificate, an injunction against the defendant may be of no avail;

That the Complaint herein alleges that the issuance by defendant of his said certificate, authorizing the establishment and operation of bank facilities in Jefferson Parish, Louisiana to be known as Whitney National Bank in Jefferson Parish would constitute a violation of *Title 12 U.S.C. Sections 36 and 1841, et seq.;*

That it appearing from the sworn allegations of the Complaint and the affidavits before the Court that because of the foregoing, plaintiffs will suffer irreparable injury, loss and damage unless a temporary restraining order be granted, as prayed, it is by the Court this 27th day of June, 1962, at 11:05 o'clock a.m.,

ORDERED, that said defendant and his agents and employees be, and he and they are hereby restrained and enjoined from issuing a Certificate of Authority, pursuant to *Title 12 U.S.C. Section 27* or otherwise, authorizing the opening and operation of bank facilities in Jefferson Parish, State of Louisiana to be known as Whitney National Bank in Jefferson Parish, and it is further,

Ordered, that the plaintiffs, or either of them, shall give security in the sum of $1000.00, conditioned for the payment of such costs and damages as may be incurred or suffered by said defendant if it be found that he shall be wrongfully restrained, and it is further

Ordered, that this restraining order shall expire on the 6th day of July, 1962, unless extended by order of this Court.

/s/ GEORGE L. HART, JR.,
Judge,
District Court of the United States
for the District of Columbia.

Filed July 7, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

BANK OF NEW ORLEANS & TRUST COMPANY, ET AL., *Plaintiffs*,

vs.

JAMES J. SAXON, *Defendant*.

Washington, D. C.
June 27, 1962

OFFICIAL TRANSCRIPT OF PROCEEDINGS

Before JUDGE GEORGE L. HART, JR.

Prepared for Clerk's Copy

GEORGE G. DAVIS, JR.
Official Reporter,
4808 U. S. Court House,
Washington 1, D. C.,
STerling 3-5700, Ext. 344.

[3] Mr. Bloom: Your Honor, I am Robert Bloom and I am Acting Chief Counsel to the Comptroller of the Currency.

In addition to the question of the time of the argument of the motion, plaintiffs' motion, we have a question of an administrative stay of the issuance of the certificate for the opening of the Whitney National Bank in Jefferson Parish, which is the issue in this case and which is the action which the plaintiff is seeking to enjoin.

Now, the circumstances under which this administrative and voluntary stay on our part arose were these: About twenty days ago, on June the 8th to be exact, which was a Friday, I received a phone call late in the day from the United States Attorney that Mr. Merrigan was in the building attempting to obtain an ex parte temporary restraining order in connection with a complaint for a declaratory judgment and preliminary and permanent in-

junction which he was getting ready to file on that Friday or the following day.

[4] Now, at that time I knew virtually nothing about the facts of the matter because the case—the administrative proceeding had been handled up to that date by my predecessor, the former Chief Counsel, and other personnel in the office. Mr. Saxon was not in the city and since it was so late on a Friday afternoon, Mr. Hannon, the U. S. Attorney, called and said that if we wished to oppose this TRO, that it would probably have to be done the following morning, Saturday morning, and he wanted to know whether it would be possible in this case for us to voluntarily agree to withhold the issuance of this certificate until the argument on the preliminary injunction could be heard.

I made a telephone call to New Orleans to the Whitney Bank people and I was told that the new bank was not quite ready to open, that the schedule called for it to be opened in ten days to two weeks from that time.

On the basis of that information and not knowing anything about the merits of the case, I agreed with Mr. Merrigan that the Comptroller would withhold the issuance of the certificate for the opening of the Jefferson bank until the argument of the preliminary injunction motion but only on condition that that motion was brought on for argument and argued as promptly as the rules of the Court would permit.

[5] Now, since that time, Mr. Merrigan, in my opinion, has done everything he possibly could to delay the hearing of his own motion. Specifically,——

The Court: Do you understand that he did not request this delay yesterday?

Mr. Bloom: Well,——

Mr. Seaman: Yes, Your Honor, we understand that.

Mr. Bloom: I understand, Your Honor.

Mr. Merrigan: I object to that, I have done everything to delay this thing; it was put on for the first time——

The Court: Wait just a minute, just a minute. I just wanted you to know that they did not ask for a delay.

Mr. Bloom: Well, I understand that, but I also understand that late yesterday afternoon in full similarity to the way the action was commenced, Mr. Merrigan filed a monumental brief of some 50 pages on an issue which is essentially a simple issue of law and which made it virtually impossible for Your Honor to hear the motion this morning.

In addition to that, immediately upon our noticing of this motion for argument, which was done by us, incidentally, and not by Mr. Merrigan, Mr. Merrigan requested that the motion be continued until the Federal Reserve Board had had an opportunity to rule on his motion for a rehearing [6] of the action of the Federal Reserve Board on May 3rd in approving the acquisition of the Whitney Jefferson Bank and the formation of the Whitney holding corporation. I told Mr. Merrigan I thought that that application would await the day in the event of the possibility that the Federal Reserve Board had ruled by the time the motion came on. In fact, the Federal Reserve Board ruled on Monday of this week and denied Mr. Merrigan's petition for a rehearing on the question of the legality of the Whitney holding corporation acquiring the stock of Whitney Jefferson Bank which happens to be the very issue at issue in this case.

Secondly, when the Whitney Bank people requested Mr. Merrigan to consent to their appearance as a defendant in this case—this is the Whitney Bank in Jefferson Parish which is the very bank which the plaintiff is seeking to prevent from opening,—Mr. Merrigan refused to consent to their intervention and put them to the task of making a motion for intervention, and, on top of that, Mr. Merrigan has entered an opposition in that motion.

Thirdly, since Mr. Merrigan has come and bombarded me with requests for inspections of records on threat of issuance of subpoena duces tecum, he has asked to see all the correspondence and records in connection with the three or four applications leading up to this final action in this [7] case. This is in spite of the fact that the issue in this case is an issue of law purely and that in all probability every fact in the case can be stipulated by both sides.

Fourthly, last week after Mr. Merrigan had filed this action and had brought on his motion for preliminary injunction, Mr. Merrigan appeared at the office of an Under-Secretary of the Treasury in the company of a United States Senator, an official of the State of Louisiana, for the purpose of having pressure brought on the Comptroller of the Currency to—disregard——

The Court: Well, I am not interested in that. What I am interested in is why it is so essential that this particular motion be heard today by a Judge without adequate prepa-

ration to hear it rather than hearing it on the 6th of July, at which time the Court will have had proper time to study this matter.

How long did it take you to understand this matter?

Mr. Bloom: Your Honor, the issue in this matter is essentially a simple issue and that is whether the bank, which the Whitney Bank wishes to open in Jefferson Parish, is a branch bank or a——

The Court: Is it a simple issue to an attorney of the Treasury Department or is it a simple issue to a Court of general jurisdiction?

[8] Mr. Bloom: Your Honor, we have no desire at all to rush Your Honor into hearing the motion before he has had a chance to satisfy himself on the reading of the papers submitted, but, in answer to your question as to why it is important that the motion be heard as soon as possible, Judge Hart, I would like to point out that this action, the issuance of this certificate to this bank in Jefferson Parish, is the final ministerial step in a long step transaction and all of the previous steps in this transaction, including the formation of the Whitney holding corporation and the exchange of the stock of the Whitney holding corporation with 1400 stockholders of the Whitney National Bank of New Orleans, has been accomplished. All of the corporate steps leading up to the organization of the new bank in Jefferson Parish have been accomplished, the articles of association have been filed, the certificate of organization has been filed. The bank premises have been purchased. Temporary quarters have been leased across the street. The necessary supplies and personnel are ready to go and actually we have an obligation, we feel, in this case, to the Whitney people, in view of the long administrative road which they have had to travel in this case because, actually, the approval of this matter was granted by the former Comptroller of the Currency, Mr. Gibney, in October of 1961 [9] and since that time it had been common knowledge in New Orleans that the Comptroller had granted his approval subject to the approval of the Federal Reserve Board of the formation of the Whitney holding corporation.

Now, that approval of the Federal Reserve has been forthcoming at the early part of May and the plaintiffs have actually had eight months since the Comptroller indicated his preliminary approval of the matter in October of 1961 to prepare this case, and there is no reason why they should

be coming in at the eleventh hour with a preliminary injunction suit to stop the issuance of a certificate which at this point, after the action of the former Comptroller of the Federal Reserve Board is really an act—a ministerial act on the part of Mr. Saxon. This is the final step to open this bank and the opening of it, the granting of the certificate, will not leave this plaintiff remediless. He has a statutory appeal direct to the Court of Appeals from a decision of the Federal Reserve Board.

In addition to that, he is in court in this case. He has the Comptroller in court and the Whitney Bank people are asking to be the defendants in this case. If at some future time after a full hearing on the merits the Court should find that the—that this bank is actually a branch and not a new independent bank, as we contend, and that the [10] Comptroller did not have legal authority to charter this bank to be owned by the Whitney holding corporation, at that point he would not be remediless because he has asked in his prayer for relief, for declaratory relief.

The Court: Well, counsel, you are arguing the final case on the merits. You still haven't told me why the action of this Court, sui sponte in continuing the hearing on the matter from today until the 6th of July, in order that the Court would have an opportunity to study hundreds of pages of briefs and exhibits before deciding the case, should be set aside. Now, why?

Mr. Bloom: Your Honor, I have no objection to the adjournment of the hearing on the motion to July 8—6th——

The Court: Sixth.

Mr. Bloom: —but I must say to Your Honor in all candor, and also to Mr. Merrigan at this point, that in view of Mr. Merrigan's actions, which I believe are calculated, all calculated to delay the action and the hearing of this motion, that I do not feel under any compulsion to delay the issuance of this certificate.

The Court: And I will advise you that unless you agree not to issue the certificate that I will issue a temporary restraining order.

[11] Mr. Bloom: Well, I would certainly request Your Honor, before doing that, to at least give Mr. Monroe, the attorney for the Whitney Bank people, an opportunity to be heard as to the effect of such an order on the situation in Louisiana, which I understand is—has other ramifications.

The Court: Well, I will be very happy to hear you on it but I will not hear it as a preliminary matter. We have many, many people waiting in the court here on previous motions which are short, so if you gentlemen will take a seat back there, I will hear these other motions and then hear you.

Mr. Bloom: All right.

Mr. Merrigan: Thank you.

(Hearing in the aforecaptioned cause was temporarily suspended while other motions on the Court's calendar were disposed of. Thereupon, motion in the aforecaptioned cause continued as follows:)

The Deputy Clerk: Bank of New Orleans and Trust Company vs. Saxon.

The Court: I believe the gentleman from New Orleans wished to say something.

Mr. Merrigan: May it please the Court, just for the record and contrary to what counsel stated, I have made [12] what I consider to be a very substantial opposition to the motion to intervene. Mr. Monroe represents a party not before the Court at this time and I have no objection to the Court hearing what he would like to say with the understanding that he is not yet a party.

Our position, Your Honor, is that the real party in interest here is the Whitney National Bank of New Orleans and they are seeking to intervene through the bank that's been established or proposed to be established.

The Court: If this is an informal hearing, I will hear anybody.

Mr. Merrigan: All right, Your Honor.

Mr. Monroe: Your Honor, my name is Malcolm Monroe from New Orleans. I am attorney for the Whitney National Bank of New Orleans, Whitney holding corporation, Whitney Bank in Jefferson Parish. There is no attempt to hide that particular fact.

We feel we are the real party in interest. This is a suit to keep the Whitney Bank in Jefferson Parish, a brand new corporation which is already organized, has held its organization meetings, has its money deposited, has been completed for over a month, and is ready to do business and has so advised the Comptroller. The only thing remaining for it to do business is certificate to issue for its

[13] commencement of business which is the last step in a long procedure.

The Court: When had you planned to open and commence business?

Mr. Monroe: About a week and a half ago. Let me explain what the issue is in this case, Judge. We have a legislature that is in session now. Let me say, first, that we have been under a stay, a consent stay that was obtained under the circumstances that have been outlined to you. We are under a temporary restraining order and they are urging you now, just like the Delaware Court said, to extend the hearing on motion for preliminary injunction. It is, in our opinion, simply the ground that the plaintiffs are after in this suit. All they are asking you to do is hold us up and I will explain to you exactly why.

The great allegation of facts, we do not deny that we are a separate corporation and that we are part of a holding company system. All of the allegations of the plaintiff have already been made before the Comptroller the past year. There is no allegation, again, that hasn't been made before the Federal Reserve. There is no allegation that wasn't made before Congress. Each one of those different agencies have refused to accept those allegations.

These plaintiffs are now before the Fed., where [14] their relief is. They propose to appeal from that. They are asking this Court to interject itself into the administrative and legal and appeal remedies that are set up in the Federal Act and they are asking to do that in order that they will affect that case but principally these plaintiffs are here asking this to be delayed because these plaintiffs are urging the Louisiana Legislature, which is now in session, these plaintiffs have a bill before the legislature now in session, it is now considering it. My information is it is considering today, a bill not only affecting holding companies in the State of Louisiana, but they have introduced an amendment in a normally standard bill which would apply retroactively to the Whitney Bank in Jefferson Parish so that it would keep it from opening its doors for business, even though it was legally qualified to do so. That is the issue before this Court. Whether they can persuade a Court a thousand miles away from the scene of this real battle, which is now a political battle, to hold up proceedings that have been going on for a year

and a half of which they have had full notice, for a year and a half, since last October, the proceedings have been going on for a year and a half. They have had full notice since last October. They have not exercised their rights up to this eleventh hour.

We point out that under the rules of this Court we [15] are under a temporary restraining order and for an extension of that, which this is the equivalent of, it ought to be awfully good grounds if we are being hurt.

The Court: Well, here is the—again, I think you all miss the point. They did not request the extension. They haven't asked for an extension. This matter came in to the Court yesterday, together with a number of other motions which this Court had to prepare, also on the same day a request from a Senate Committee that the Court appear there tomorrow morning and testify in regard to a pending bill which the Court feels necessary to do some studying on before it goes up there, and when I got to this file yesterday afternoon, it occurred to me that the matter was so complex and there was such a number of exhibits and so many papers in it that I couldn't possibly read it and be ready to hear this motion and intelligently decide it today. Therefore, at my own suggestion, I tried to get the first date next week that was available for a motion of this length because I am sure it is going to take quite a while to argue and I set it down for the 6th to be heard, which would give the Court the time to examine into this thing and have some knowledge of what it is about before it tries to decide it.

Mr. Monroe: Well, Your Honor, we are not for a moment suggesting that you decide the complicated issues that [16] are here. The suit is for a declaratory judgment and the suit is for a stay, from a temporary to a permanent stay. Now we are saying that the only thing that we are complaining of—we are perfectly willing to stay in court and give the Court all the opportunity in the world to consider the real issues in this case and if the Court finally concludes that what we are doing is illegal, the Court has jurisdiction over us and can stop us, but there is no—we are going to be damaged severely if the Court exercises the exemplary remedy of issuing an injunction. There is no reason why this can't be set up on the merits and that——

The Court: Well, now you are talking about a preliminary restraining order.

Mr. Monroe: That's right.

The Court: Which would be heard next Friday. Also your motion to intervene, which wasn't ready for hearing today, it will also be set down for next Friday and both motions will be disposed of at one time. The granting of a preliminary restraining order in this case, or not, is going to be a very serious matter for all concerned, and it is a matter, certainly, that should not be entered into lightly.

Mr. Monroe: Well, Your Honor, we don't believe it has a great deal of bearing whether they get the restraining order, only a bearing on whether it holds us up with relation [17] to the Louisiana Legislature which is now in session and with relation to the Federal appeal procedures, we feel that the effect of delaying this is having its relationship to the Court that they are normally in, that they have injected this Court into another proceeding and they are asking this Court to interfere with the procedures in there where they are entitled and have already appeard and were denied, and in the record is the Federal ruling denying them a rehearing. They have had plenty of opportunity to go that route and what we are saying to Your Honor——

The Court: Well, are you going to be greatly prejudiced if this matter is put off until next Friday?

Mr. Monroe: We cannot answer, we cannot anticipate the Louisiana Legislature, Your Honor.

The Court: Well heavens knows I can't.

Mr. Merrigan: Well, I think counsel might——

The Court: I don't quite understand what the Louisiana Legislature business is all about.

Mr. Monroe: Because the position of the plaintiff inevitably depends—his whole position depends on what the Louisiana law is. These plaintiffs are trying to change Louisiana law.

The Court: Well, how could what I do here have anything to do with what the Louisiana Legislature does?

[18] Mr. Monroe: The legislature is passing a statute—has before it a statute—not passing it—we trust they won't pass it—but has before it a statute which says that if the bank in Jefferson Parish has not opened its doors for business, it cannot thereafter open.

The Court: Oh, I thought it was retroactive so that even if you did open you would have to close.

Mr. Monroe: I don't think they'd go that far and if they did, we would certainly be delighted to take that on as a legal argument, but we do not want, just because this Court is delayed by lengthy proceedings, to be additionally prejudiced by being faced with the argument that you were not open, the reason you didn't open was the Court up here kept you from opening while it had an opportunity to consider the papers, which is perfectly reasonable. I understand that. Don't mistake me but just saying we are being put in a very, very awkard position if they pass that statute which says you were not open, the statute says if you haven't opened, you can't open and therefore it's a constitutional statute. Now, if we are open and the statute says you've got to close, then we are in a different position.

We, for a year, have been operating under present Louisiana law. We are now faced with not being able to operate under present Louisiana law because of the proceedings [19] in this Court.

We don't believe that this Court should exercise its discretion on the basis of these pleadings to issue the harsh relief particularly when we say to this Court that they cannot be prejudiced: They cannot possibly be prejudiced. We will agree with this Court that when it hears the case and if the declaratory judgment in this case is against us, we will agree that we will have to abide by that declaratory judgment when it becomes final after appeal, and so forth but we will not urge—the only ground they can have for a preliminary injunction is that they would be prejudiced if it was not issued.

I submit they have not stated that they can possibly be prejudiced and we will, and we believe the burden is on them to show that they will be prejudiced. We have put in our brief that we will stipulate with this Court that we are before you and——

The Court: Well, they have got to show irreparable injury.

Mr. Monroe: I don't think they have, Your Honor.

The Court: Well, and I don't know.

Mr. Monroe: Well, we are in a difficult position. We have been up here since—we have been up here since a week ago

Monday asking to get into this case and in every way [20] we have been objected to. The objection that was finally filed was filed on Tuesday, which I understand was seven full days after we filed our motion to get in.

The Court: Well, let me see something else. Mrs. Davis, could this possibly be heard on the second?

The Deputy Clerk: No, Your Honor, Judge Holtzoff won't even be here.

(The Court conferred with the Deputy Clerk.)

Mr. Merrigan: Your Honor, may I be heard? It is an informal proceeding but the wisdom of not hearing parties not a party to the case yet and bringing in a lot of issues which really cloud the issues, the real facts of the case between the plaintiff and the official of the United States Government have been very amply demonstrated here. I am always impressed with the wisdom of the law which prevents these things until the party is actually in the case, and, certainly, from what has been said here today would certainly indicate that that is a very wise thing, and I have been accused of some influences here today that honestly I never understood as a young lawyer I could possibly have and I'd like to put our position before the Court at this point, if we possibly could.

The Court: Well, I am going to let you put your position before the Court. Just take it easy and be patient.

[21] Mr. Merrigan: All right, Your Honor, thank you.

The Court: Do you have anything further to say?

Mr. Monroe: I don't think so, Your Honor. We hope that you can set the thing, if you cannot pass on it today, as soon as possible, and I just want to say again that I don't think it can be any irreparable injury if we agree to stay before the Court and we do that, but we want to open business for reasons that I have outlined.

The Court: All right. Now what have you all got to say?

Mr. Merrigan: Your Honor, first of all, we are faced with this situation. We have Mr. Monroe representing a party who is not before the Court, saying that he will consent to be bound by anything the Court might do after a trial on the declaratory judgment complaint. I haven't heard that statement from the Comptroller of the Currency, who is our defendant here.

The Court: Well, they don't have to say it. There is

no question about the fact that they are going to be bound by any declaratory judgment the Court issues.

Mr. Merrigan: There has been a long series of cases over the years which say that once a certificate issues from the Comptroller of the Currency no one but the Comptroller, himself, can attack it and that would be true of this case. [22] I don't think anyone can deny it.

The Court: Well, that, then, would mean that we wouldn't issue the declaratory judgment.

Mr. Merrigan: I hope that is what it means because in the first page of the Comptroller's points and authorities on this motion, which was before the Court today, he said plaintiffs have received assurance from the Comptroller's office that no certificate of authority will be issued in this matter until after the Court acts on the pending motion and then he goes on, because of this assurance, no temporary restraining order has been sought.

The facts are that when I was going to come down here to obtain a temporary restraining order, I called Miss Hummer and told her that I intended to come in on Friday afternoon or early Saturday, that I had just completed preparations of the complaint and supporting papers. I received a telephone call from Mr. Hannon in the United States Attorney's office and he said, "Can't we get a voluntary arrangement here whereby the certificate you seek will be held in abeyance until the motion for preliminary injunction is heard and determined?"

I said I would have no objection to that provided the Comptroller of the Currency would agree. Mr. Hannon called from the United States Attorney's office to Mr. Bloom, [23] who is General Counsel to the Comptroller, and without any request on my part basically, they agreed that they would hold the certificate of authority in this matter in their office and not issue it until the Court acted on the motion for preliminary injunction.

Number two: I am accused of going to the Under-Secretary of the Treasury with a Senator. Let me just say, Your Honor, that I called Mr. Bloom and I said, could my people come up from New Orleans and talk to you about this situation. They have had no opportunity to present their side of the case. There are no hearings——

The Court: You don't have to defend yourself against

any accusations of that sort made because I have forgotten them already.

Mr. Merrigan: Well, I hope so, Your Honor, because the fact is that I didn't even ask for such a conference until the—I was advised by Mr. Bloom that we could talk as long as we wanted, we would be wasting our time, the Comptroller had made up his mind and that was that.

I don't want Your Honor to think that we have been in here litigating for a year, as has been indicated here today. The first step that these plaintiffs have taken in these proceedings was when we filed a complaint here. There was no formal statutory hearing before the Federal Reserve [24] Board because the Comptroller told the Board that he consented to the Whitney situation.

The Court: Well, now again, this motion is being argued on its merits and that is not what I am considering. I think, gentlemen, here is the situation:

If this Court tried to hear this motion today, the only thing I could do would be to take it under advisement and study the file and make a decision. I would then have to hear the argument without being able to ask intelligent questions of counsel which might clear up some points, because I would not be familiar with the file. There are Judges who hear motions without reading the file. I am not one of them. Maybe they are a lot smarter than I am. I am not smart enough to do that and particularly in a case this complex. So, if I heard it today you still wouldn't get a decision before next Friday.

Under the circumstances, I regret, gentlemen, but I know nothing else to do but to leave this matter set for hearing on a preliminary injunction and the motion to intervene, next Friday. If the Treasury Department, the Comptroller, will not agree to withhold the issuance of the certificate until that time, then I will today sign a temporary restraining order.

Now, I am sorry but that is all the choice we have [25] in the matter. Now, would you rather I issue a temporary restraining order or would you rather agree to withhold it until next Friday?

Mr. Bloom: Well, Your Honor, I see no point in putting counsel and yourself to the trouble of drawing a paper if I don't have to.

Mr. Merrigan: Papers are drawn.

The Court: Well, it is no problem.

Mr. Bloom: Well, if the papers are drawn, I don't know, you see, because this voluntary situation puts me in a—the Comptroller in a difficult situation.

The Court: Well, if you don't want to be in the voluntary sifuation, I will relieve you of it.

Mr. Merrigan: May I file the motion for a temporary restraining order with the supporting affidavit?

The Court: Well, let's see what counsel wishes to do. Would you prefer that you not be requested to do it voluntarily but that the Court issue the temporary restraining order?

Mr. Bloom: I think it would be better if the order was issued.

The Court: All right, then let me have the order.

(Mr. Merrigan handed the order to the Court.)

* * * *

Filed June 29, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

[Title omitted]

DEFENDANT'S RESPONSE TO MOTION OF THE BANK OF LOUISIANA IN NEW ORLEANS TO INTERVENE AS A PLAINTIFF

Comes now the defendant Comptroller of the Currency, through his undersigned counsel, and states to the Court that he has no objection to the granting of the motion of the Bank of Louisiana in New Orleans to intervene as a plaintiff in this action.

Said defendant however, reserves the right to make all objections he may have to the granting of relief to any plaintiff herein, including the Bank of Louisiana in New Orleans, at any stage in this litigation, including specifically the right to object to the standing of any plaintiff to sue.

JOSEPH D. GUILFOYLE
Acting Assistant Attorney General.

DONALD B. MACGUINEAS,
DAVID V. SEAMAN,
Attorneys, Department of Justice
Attorneys for Defendant.

Of Counsel:

DAVID C. ACHESON,
United States Attorney.

Filed June 29, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

[Title omitted]

DEFENDANT'S RESPONSE TO MOTION FOR VOLUNTARY DISMISSAL BY MERCHANTS TRUST AND SAVINGS BANK

Comes now the defendant Comptroller of the Currency, through his undersigned counsel, and states to the Court that he has no objection to the granting of the motion for voluntary dismissal by plaintiff Merchants Trust and Savings Bank in this action.

JOSEPH D. GUILFOYLE
Acting Assistant Attorney General.

DONALD B. MACGUINEAS,
DAVID V. SEAMAN,
Attorneys, Department of Justice
Attorneys for Defendant.

Of Counsel:

DAVID C. ACHESON,
United States Attorney.

Filed July 5, 1962

STATE OF LOUISIANA,
Parish of Orleans:

Before me, the undersigned authority, personally came and appeared:

LEON M. TRICE a person of the full age of majority and a resident of the Parish of Orleans, State of Louisiana, who after being by me, Notary, first duly sworn, did depose and say:

That he is a commercial photographer and has been engaged in business in the City of New Orleans as a commercial photographer for forty years.

That on July 3, 1962 at approximately 12:30 P. M. he personally made the six (6) photographs attached hereto, signed on the reverse thereof by him and marked FB 659-1 through 6, inclusive; that these photographs were taken at or in the vicinity of the intersection of Jefferson Highway and Central Avenue, Jefferson Parish, Louisiana; that Photograph No. FB 659-4 is a true and accurate photograph taken on the date aforesaid of the premises bearing Municipal No. 4407 Jefferson Highway, Jefferson Parish, Louisiana; Photograph No. FB 659-3 is a true and accurate photograph taken on the date aforesaid of the premises 4407 Jefferson Highway, showing the property adjacent to 4407 Jefferson Highway, and depicts all of the property from the intersection to approximately 200 feet therefrom on the North side of Jefferson Highway; Photograph No. FB 659-1 is a true and accurate photograph taken on the date aforesaid of the premises directly across Jefferson Highway from and opposite to the premises 4407 Jefferson Highway; Photograph FB 659-2 is a true and accurate photograph taken on the date aforesaid of the area from the intersection of Jefferson Highway and Central Avenue and depicts all of the property from the intersection to approximately 400 feet therefrom on the South side of Jefferson Highway and is that side of Jefferson Highway opposite from the premises 4407 Jefferson Highway; Photograph FB 659-6 is a true and accurate photograph taken on the date aforesaid of the area directly opposite from the premises 4407 Jefferson Highway and across said highway.

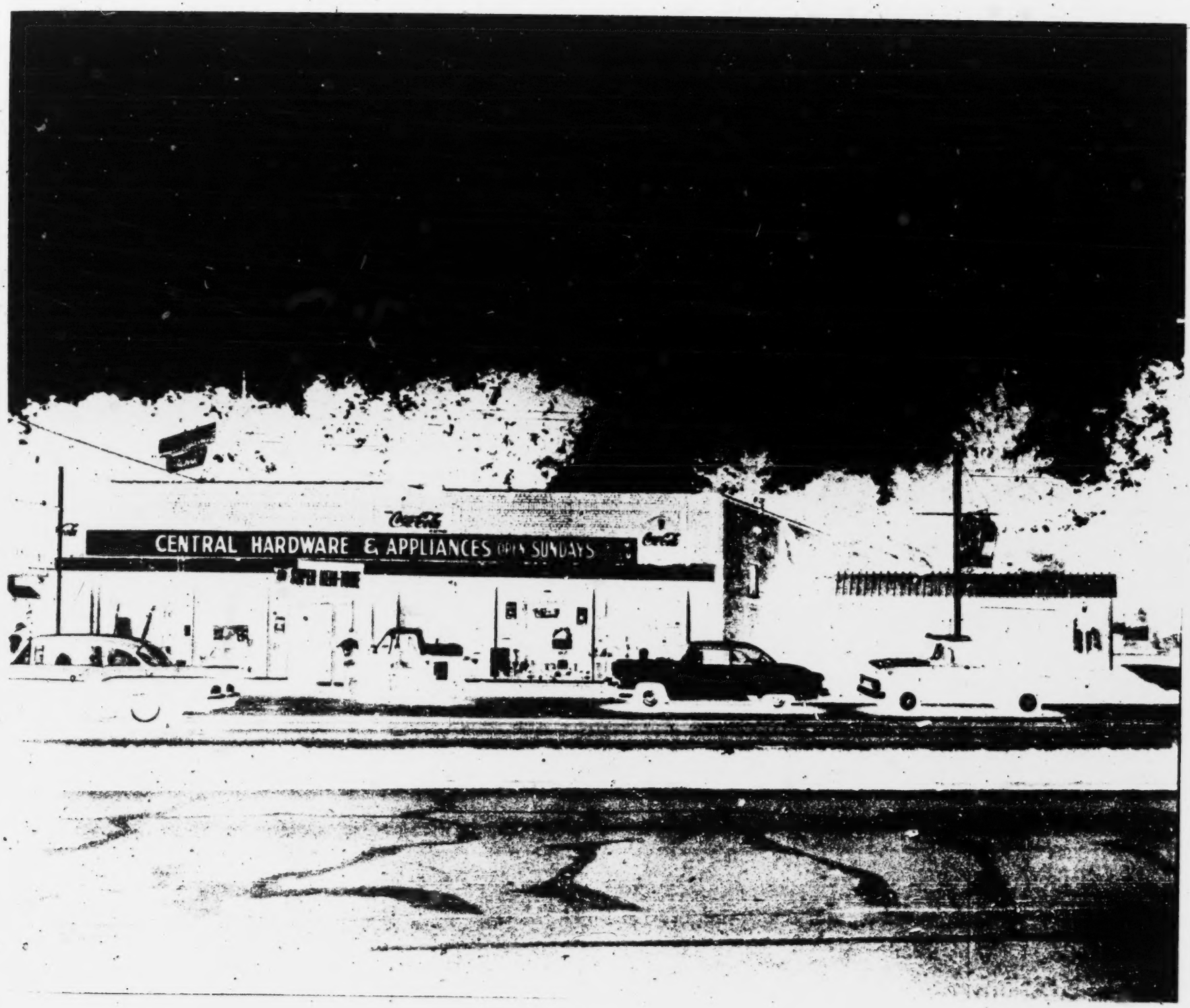
LEON M. TRICE.

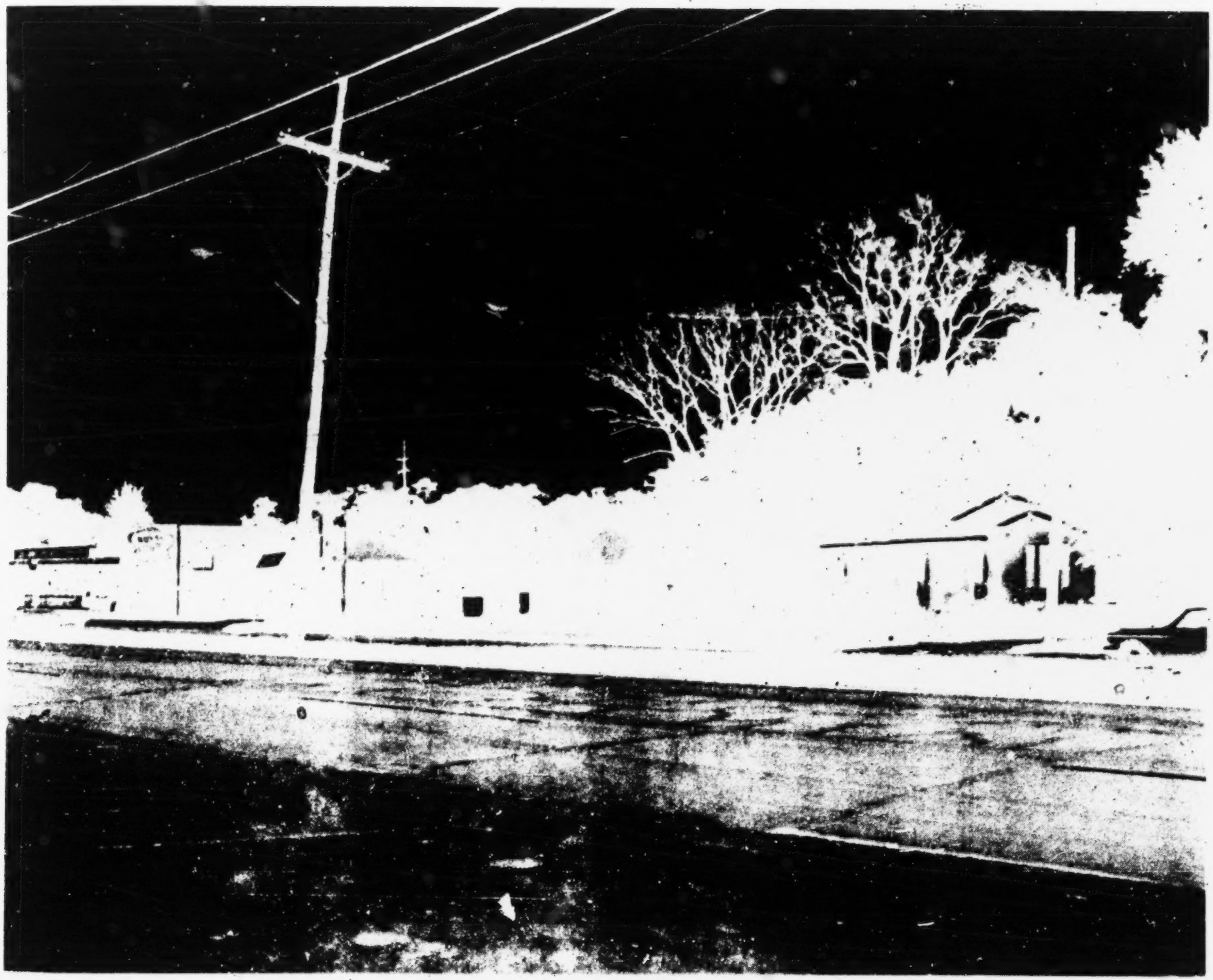
Sworn to and subscribed before me this 3rd day of July, 1962.

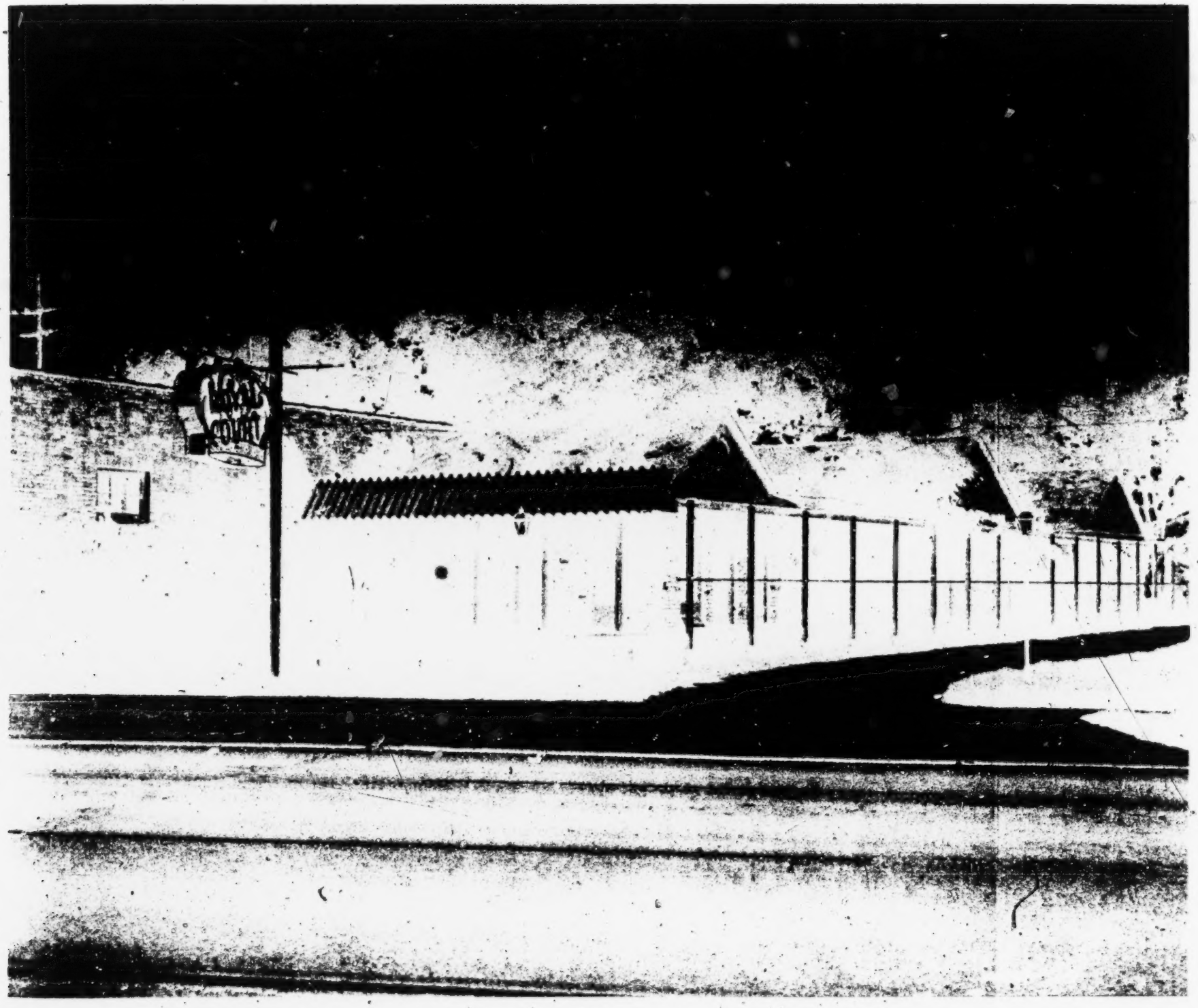
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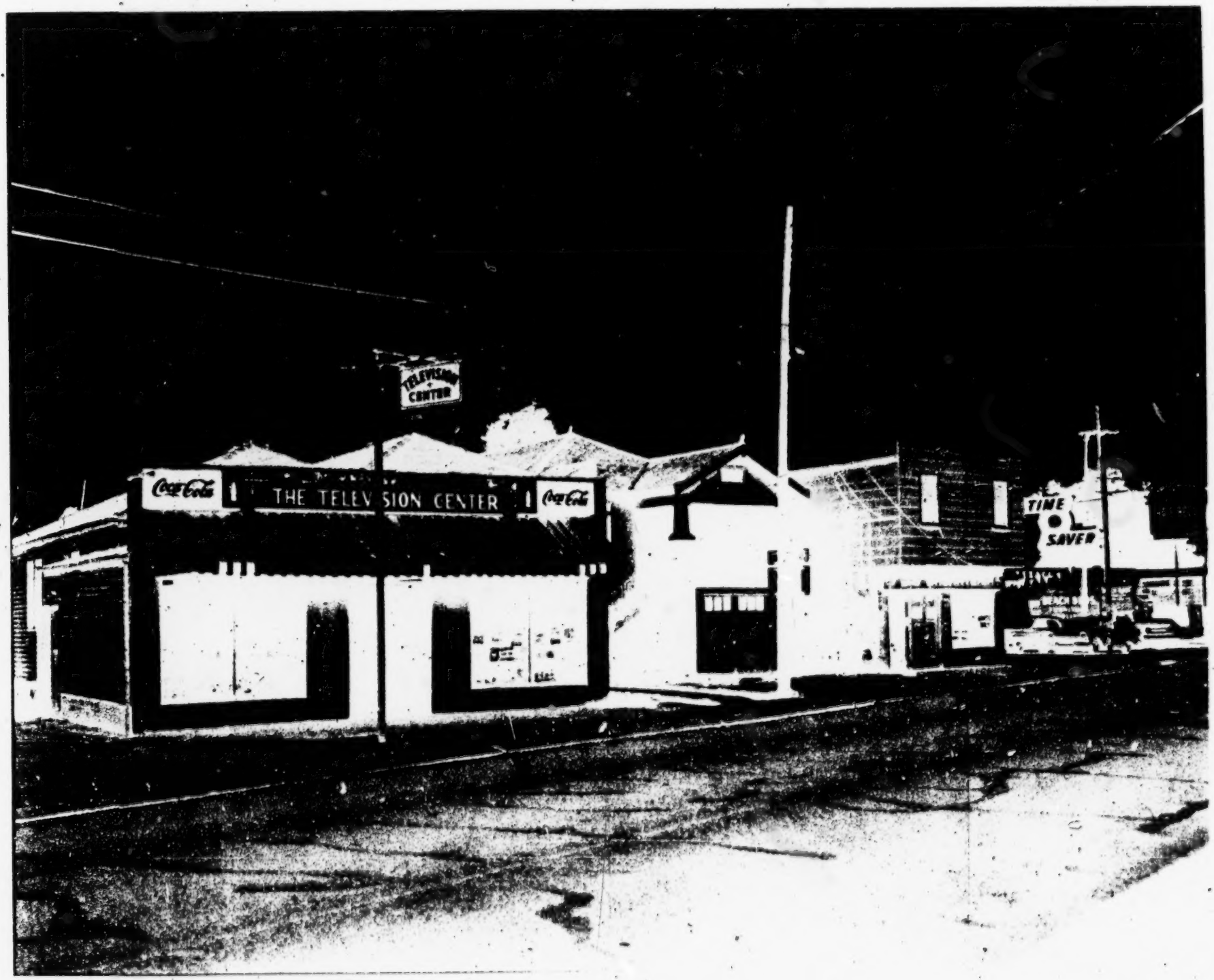

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Filed July 5, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

[Title omitted]

AFFIDAVIT IN SUPPORT OF PLAINTIFF, BANK OF NEW ORLEANS AND TRUST COMPANY

STATE OF LOUISIANA,
Parish of Orleans:

Before me, the undersigned authority, personally came and appeared:

JACQUES A. LIVAUDAIS, a person of the full age of majority and a resident of the Parish of Orleans, who after being by me, Notary, first duly sworn, did depose and say:

That he is the Executive Vice President of the plaintiff, the Bank of New Orleans and Trust Company, and he submits this affidavit in support of the pending motion for preliminary injunction in the above entitled cause:

That he understands that it has been asserted in this action hat plaintiff, the Bank of New Orleans and Trust Company, would suffer no damage to its business, its properties or its profits if the defendant, Comptroller of the Currency, issued a certificate to the Whitney National Bank of New Orleans to establish banking facilities in Jefferson Parish, Louisiana. Affiant states that such assertions are untrue and incorrect for the following reasons:

Plaintiff, the Bank of New Orleans and Trust Company, maintains its principal offices and banking branches entirely within the Parish of Orleans, State of Louisiana, and is restricted by State law from establishing banking facilities in Jefferson Parish or any other Parish in the State of Louisiana. Notwithstanding the fact that this plaintiff's banking facilities are limited to the Parish of Orleans, a very large number of the plaintiff's customers, depositors and borrowers reside in and are principally located in

Jefferson Parish, Louisiana. Affiant has reviewed the ledgers of the Bank of New Orleans and Trust Company and:

1. As of June 21, 1962 the total amount of checking accounts of depositors who reside in or whose businesses are located in Jefferson Parish amounted to approximately $2,029,000.00, and represented deposits by 2812 individuals and businesses and accounted for approximately 12.3% of the total checking account deposits of customers on that date. In addition to checking accounts the Bank serves a very large number of individuals and businesses who reside in or are located in Jefferson Parish and who maintain savings and other type deposits with it.

2. As of June 2, 1962 the total amount of commercial loans to persons residing in or businesses located in Jefferson Parish exceeding $10,000.00 amounted to approximately $3,410,000.00 and accounted for approximately 15% of the total amount of commercial loans exceeding $10,000.00 of all customers of the Bank on that date. The foregoing figures are limited to commercial loans exceeding $10,000.00. In addition there to the Bank has outstanding a large volume of commercial loans to persons residing in or businesses located in Jefferson Parish in amounts less than $10,000.00 as well as loans of all other types.

In fact a substantial number of the largest depositors and borrowers of the Bank are residents of and are businesses located in Jefferson Parish.

Accordingly, should the Comptroller of the Currency authorize the Whitney National Bank of New Orleans, the largest bank in the State, with combined resources of almost one half billion dollars, to open branch banking facilities through one device or another in Jefferson Parish, plaintiff would necessarily suffer severe loss of loans, deposits and other business and would sustain drainage to its business and profits exceeding $50,000.00 per year. Additionally, if the Comptroller is permitted to issue the certificate of authority, as he proposes to do unless enjoined, this plaintiff would have no adequate remedy at law and could be unable to defend itself against the diversion to

and appropriation by said Whitney National Bank of a substantial part of the banking business and services now enjoyed by the Bank of New Orleans and Trust Company.

JACQUES A. LIVAUDAIS.

Sworn to and subscribed before me on this 3rd day of July, 1962.

[Copy Illegible],
Notary Public

Filed July 5, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

[Title omitted]

ORDER GRANTING MOTION OF THE BANK OF LOUISIANA IN NEW ORLEANS TO INTERVENE AS A PLAINTIFF

Upon consideration of the Motion of The Bank of Louisiana in New Orleans for leave to intervene as a plaintiff in this action and to join with the other plaintiffs herein, in seeking the relief prayed for in the Complaint herein, and the defendant having advised the Court by written response to the motion that he has no objection to the granting of said motion, it is by the Court this 5th day of July, 1962

Ordered, that the said motion of The Bank of Louisiana in New Orleans for leave to intervene as a plaintiff in this action and to join with the other plaintiffs herein in seeking the relief prayed for in the Complaint herein be and the same hereby is granted, and The Bank of Louisiana in New Orleans be and the same hereby is admitted by the Court as a party plaintiff to this action.

[Copy illegible],
Judge,
United States District Court
for the District of Columbia.

Filed July 5, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

[Title omitted]

AFFIDAVIT IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

CITY OF WASHINGTON,

District of Columbia, ss:

Edward L. Merrigan, being duly sworn, deposes and says:

I am the attorney for plaintiffs herein.

Filed herewith is a copy of House Bill No. 1221 of the 1962 Louisiana Legislature, "To prohibit the formation of new bank holding companies and to control expansion of existing bank holding companies and of their subsidiaries."

This Bill was passed by the Louisiana House of Representatives, with the amendments shown, on June 27, 1962, by a vote of 80 to 16. It was, I am advised, passed without change of the House version, by the Louisiana Senate on July 4, 1962 by a vote of 28 to 7. I am advised that the legislation was supported by the Administration of the State of Louisiana and by the State Banking Commissioner of Louisiana, and is expected to be signed into law by the Governor without substantial delay.

EDWARD L. MERRIGAN.

Sworn to and subscribed before me this 5th day of July, 1962.

[Illegible]
Notary Public.

My Commission Expires May 15, 1966.

HOUSE BILL NO. 1221--

By Mr. Angelle (By Request)

AN ACT

To define the bank holding company, to prohibit the formation of new bank holding companies, and to control the future expansion of existing bank holding companies and of their subsidiaries.

Be it enacted by the Legislature of Louisiana:

Section 1. Declaration of Policy.

It is declared to be the policy of this State to protect and to foster the growth of the independent unit bank, and institution whose ownership and origins are grounded in the local community and whose activities are bound up with local economic and social organizations; to prevent the undesirable concentration of control in the banking field to the detriment of the public interest; to insure effective competition among all banking institutions; and, to accomplish these objectives by prohibiting the formation of new banking holding companies and the acquisition of control by whatever means of additional banking institutions by existing bank holding companies and by their subsidiaries.

Section 2. Definitions.

(a) "Bank holding company" means any company, foreign or domestic, including a bank, (1) which directly or indirectly owns, controls, or holds with power to vote, 25 per centum or more of the voting shares of any bank or (2) which

The State Bank Commissioner shall administer and carry out the provisions of this Act and may issue such regulations and orders as may be necessary to discharge this duty and to prevent evasions of the Act.

Section 6. Savings Clause.

Nothing herein contained shall be interpreted or construed as approving any act, action, or conduct which is or has been or may be in violation of any existing law, nor shall anything herein contained constitute a defense to any action, suit or proceeding pending or hereafter instituted on account of any prohibited antitrust or monopolistic act, action, or conduct.

Section 7. Severability.

If any provision of this Act or the application of such provision to any person or circumstance, shall be held invalid, the remainder of the Act, and the application of such provision to persons or circumstancesother than those to which it is held invalid, shall not be affected thereby.

Section 8. Repeal.

All laws or parts of laws in conflict herewith are hereby repealed.

208

and to foster the growth of the independent unit bank, and institution whose ownership and origins are grounded in the local community and whose activities are bound up with local economic and social organizations; to prevent the undesirable concentration of control in the banking field to the detriment of the public interest; to insure effective competition among all banking institutions; and, to accomplish these objectives by prohibiting the formation of new banking holding companies and the acquisition of control by whatever means of additional banking institutions by existing bank holding companies and by their subsidiaries.

Section 2. Definitions.

(a) "Bank holding company" means any company, foreign or including a bank, (1) which directly or indirectly owns, controls, or holds with power to vote, 25 per centum or more of the voting shares of any bank, or (2) which controls in any manner the election of a majority of the directors of any bank, or (3) for the benefit of whose shareholders or members 25 per centum or more of the voting shares of any bank or a bank holding company is held by trustees; and for the purposes of this Act, any successor to any such company shall be deemed to be a bank holding company from the date as of which such predecessor company became

acquired by a bank holding company which is a bank, or by any banking subsidiary of a bank holding company, in satisfaction of a debt previously contracted in good faith, but such bank holding company or such subsidiaries shall dispose of such shares within a period of two years from the date on which they were acquired or from the date of enactment of this Act, whichever is later.

(B) nor shall this act apply to shares which are held or acquired by a bank holding company which is a bank or by any banking subsidiary of a bank holding company, in good faith in a fiduciary capacity; except where such shares are held for the benefit of the shareholders of such bank holding company or any of its subsidiaries, or to shares which are of the kinds and amounts eligible for investment by National banking associations under the provisions of section 5136 of the Revised Statutes; or to shares lawfully acquired and owned prior to the date of enactment of this Act by a bank which is a bank holding company, or by any of its wholly owned subsidiaries.

a bank holding company. Notwithstanding the foregoing, (A) no company shall be a bank holding company by virtue of its ownership or control of shares acquired by it in connection with its underwriting of securities and which are held only for such period of time as will permit the sale thereof upon a reasonable basis, and (B) no company formed for the sole purpose of participating in a proxy solicitation shall be a bank holding company by virtue of its control of voting rights of shares acquired in the course of such solicitation, (C) nor shall this act apply to sha:

(b) "Company" means any corporation, business trust, partnership, association, or similar organization doing business in this State, but shall not include any corporation the majority of the shares of which are owned by the United States or by any State,

(c) "Bank" means any commercial bank, savings bank, trust company or similar organization doing business in this State.

(D) nor shall this act apply to shares which are held or acquired by a bank holding company which is a bank or by any banking subsidiary of a bank holding company, in good faith in a fiduciary capacity; except where such shares are held for the benefit of the shareholders of such bank holding company or any of its subsidiaries, or to shares which are of the kinds and amounts eligible for investment by National banking associations under the provisions of section 5136 of the Revised Statutes; or to shares lawfully acquired and owned prior to the date of enactment of this Act by a bank which is a bank holding company, or by any of its wholly owned subsidiaries.

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(b) "Company" means any corporation, business trust, partnership, association, or similar organization doing business in this State, but shall not include any corporation the majority of the shares of which are owned by the United States or by any State.

(c) "Bank" means any commercial bank, savings bank, trust company or similar organization doing business in this State.

(d) "Subsidiary," with respect to a specified bank holding company, means (1) any company 25 per centum or more of whose voting shares (excluding shares owned by the United States or by any company wholly owned by the United States) is owned or controlled by such bank holding company; or (2) any company the election of a majority of whose directors is controlled in any manner by such bank holding

company; or (3) any company 25 per centum or more of whose voting shares are held by trustees for the benefit of the shareholders or members of such bank holding company.

(e) The term "successor" shall include any company which acquires directly or indirectly from a bank holding company shares of any bank, when and if the relationship between such company and the bank holding company is such that the transaction effects no substantial change in the control of the bank or beneficial ownership of such shares of such bank.

Section 3. Prohibitions upon Acquisition of B

~~SECTION 3. PROHIBITIONS UPON ACQUISITIONS OF~~ BANK SHARES OR ASSETS.

It shall be unlawful (1) for any action to be taken which results in a company or a bank becoming a bank holding company as defined in this Act; (2) for any bank holding company or subsidiary thereof to acquire direct or indirect ownership or control of any voting shares of any bank if, after such acquisition, such company or subsidiary will directly or indirectly own or control more than 25 per centum of the voting shares of such bank; (3) for any bank holding company or subsidiary thereof to acquire all or substantially all of the assets of a bank; or (4) for any bank holding company or subsidiary thereof to merge or consolidate with any other bank

the transaction effects no substantial change in the control of the bank or beneficial ownership of such shares of such bank.

Section 3. Prohibitions upon Acquisition of Bank Shares or Assets.

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It shall be unlawful (1) for any action to be taken which results in a company or a bank becoming a bank holding company as defined in this Act; (2) for any bank holding company or subsidiary thereof to acquire direct or indirect ownership or control of any voting shares of any bank if, after such acquisition, such company or subsidiary will directly or indirectly own or control more than 25 per centum of the voting shares of such bank; (3) for any bank holding company or subsidiary thereof to acquire all or substantially all of the assets of a bank; or (4) for any bank holding company or subsidiary thereof to merge or consolidate with any other bank holding company or any subsidiary thereof; Notwithstanding the foregoing, this prohibition shall not apply to additional shares acquired by a bank holding company in a bank in which such bank holding company owned or controlled a majority of the voting shares prior to such acquisition.

(5) for any bank holding company or subsidiary thereof to open for business any bank not now opened for business, whether or not, a charter permit, license or certificate to open for business has already been issued.

Section 4. Penalties.

~~SECTION 4. PENALTIES.~~

Any bank, bank holding company, company, or any subsidiary of any of them which willfully violates any provision of this Act, or any regulation or order issued by the State

Bank Commissioner pursuant thereto, shall upon conviction be fined not less than $500 nor more than $1,000 for each day during which the violation continues. Any individual who willfully participates in a violation of any provision of this Act shall upon conviction be fined not less than $1,000 nor more than $5,000 or imprisoned not more than one year, or both.

Section 5. Administration.

The State Bank Commissioner shall administer and carry out the provisions of this Act and may issue such regulations and orders as may be necessary to discharge this duty and to prevent evasions of the Act.

Section 6. Savings Clause.

Nothing herein contained shall be interpreted or construed as approving any act, action, or conduct which is or has been or may be in violation of any existing law, nor shall anything herein contained constitute a defence to any action, suit or proceeding pending or hereafter instituted on account of any prohibited antitrust or monopolistic act, action, or conduct.

Section 7. Severability.

If any provision of this Act or the application of such provision to any person or circumstance, shall be held invalid, the remainder of the Act, and the application of such provision to persons or circumstancesother than those

Filed July 6, 1962

[Title omitted]

STATE OF LOUISIANA,
Parish of Orleans:

Before me, the undersigned authority, personally came and appeared:

JOSEPH MERRICK JONES of the full age of majority, who after being first duly sworn did depose and say:

That he is the senior partner in the law firm of Jones, Walker, Waechter, Poitevent, Carrere & Denegre, which firm through its partners and associates is engaged in the practice of law in the City of New Orleans.

That he submits this affidavit because of the improper, misleading and impertinent inferences made by James J. Gilly, Executive Vice-President of the Whitney National Bank of New Orleans, in his "Affidavit in support of Defendant," and the statement contained in Paragraph 7 of the "Third Defense" of the answer of the applicant to intervene, Whitney National Bank of Jefferson Parish, filed in these proceedings entitled "Bank of New Orleans and Trust Company et al vs. James J. Saxon, Comptroller of the Currency," No. 1857-62 of the docket of the United States District Court for the District of Columbia.

That the only client represented by this firm or any of its members in the aforesaid proceedings, either directly or indirectly, is plaintiff, the Bank of New Orleans and Trust Company, on whose behalf this firm has instituted the aforesaid procedings solely and exclusively to protect the valuable property rights of said Bank, which would be irreparably damaged if the Whitney National Bank of New Orleans is permitted by the Comptroller of the Currency to establish banking facilities in Jefferson Parish, Louisiana.

This law firm has represented the Bank of New Orleans and Trust Company since its organization in 1946 and has also for many years represented The National Bank of Commerce in New Orleans in many of its legal matters. Affiant advised the National Bank of Commerce in New Orleans of his firm's proposed representation of the Bank

of New Orleans and Trust Company in this proceeding and was told that said Bank had no objection to his undertaking this representation. Any insinuations by the officials of the Whitney National Bank of New Orleans that the aforesaid law firm is representing the National Bank of Commerce in New Orleans in these procedings are improper and false.

JOSEPH MERRICK JONES.

Sworn to and Subscribed before me this 3rd day of July, 1962.

JOHN J. WEIGEL,
Notary Public.

Filed July 6, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

[Title omitted]

ORDER

Upon consideration of the motion for voluntary dismissal by the plaintiff Merchants Trust and Savings Bank, and it appearing that the defendant Comptroller of the Currency has indicated no objection to the granting of this motion, and for good cause shown, it is hereby

Ordered that said motion be and the same hereby is granted and the Merchants Trust and Savings Bank is hereby dismissed as a plaintiff from this action.

Done this 6 day of July, 1962.

ALEXANDER HOLTZOFF,
United States District Judge

Filed July 10, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

[Title omitted]

ANSWER OF INTERVENING DEFENDANT TO PLAINTIFFS' COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE ORDER

Whitney National Bank in Jefferson Parish, the intervening defendant, answers the plaintiffs' complaint as follows:

First Defense

The complaint fails to state a claim upon which relief can be granted.

Second Defense

(1) It is admitted that plaintiff, Bank of New Orleans and Trust Company, is a banking corporation duly organized and existing under and pursuant to the laws of the State of Louisiana and that it maintains its principal office and banking branches entirely within the City of New Orleans, State of Louisiana. The allegations contained in Paragraph I are otherwise denied.

(2) It is admitted that plaintiff, Merchants Trust and Savings Bank, is a banking corporation duly organized and existing under and pursuant to the laws of the State of Louisiana and that it maintains its banking offices and facilities entirely on the East Bank of the Mississippi River in the Parish of Jefferson, State of Louisiana. The allegations contained in Paragraph 2 are otherwise denied.

(3) It is admitted that plaintiff, Guaranty Bank and Trust Company, of Lafayette, Louisiana, is a banking corporation organized and existing under and pursuant to the laws of the State of Louisiana and maintains its banking offices and facilities in Lafayette Parish, State of Louisiana. The allegations contained in Paragraph 3 are otherwise denied.

(4) The allegations contained in Paragraph 4 are admitted.

(5) The allegations contained in Paragraph 5 are denied,

except to admit the existence of the statutory provisions referred to therein. Intervening defendant specially avers that the matters herein sued upon insofar as they involve the Comptroller of Currency are strictly within an area committed to his sole and uncontrolled discretion and are not subject to judicial review.

(6) It is admitted that plaintiffs are all engaged in the banking business of the State of Louisiana. The allegations contained in Paragraph 6 are otherwise denied. It is specially averred that Section 36 of Title 12 of the United States Code has no application whatsoever to the matters herein sued upon, and that what is actually involved, namely action by the Comptroller of Currency pursuant to Section 27 of said title, is and would be within an area of discretion committed to said office exclusively, and not subject to judicial review.

(7) The allegations of the first sentence of Paragraph 7 are admitted. The allegations of the second sentence deal in relative terms and if called upon to admit or deny the said allegation, intervening defendant denies same for lack of sufficient information to justify a belief. Intervening defendant admits that as of June 30, 1961, it held approximately 39% of the total deposits in all banks in the Parish of Orleans, State of Louisiana, and 44% of all deposits of individuals, partnerships and corporations, but the remaining allegations of the third sentence of the first paragraph of Paragraph 7 are relative terms, and if called upon to admit or deny said allegations, intervening defendant denies same for lack of sufficient information to justify a belief.

(8) The allegations contained in Paragraph 8 are denied, except to admit the existence of Title 12, United States Code Sections 27 and 36, and intervening defendant specially avers that Section 36 has no application whatsoever to the matters herein sued upon. Intervening defendant further avers that insofar as Section 27 may be concerned, any action of the Comptroller of the Currency pursuant thereto is in an area committed to the sole discretion of said officer, and is not subject to judicial review.

(9) Intervening defendant admits the existence of Louisiana Revised Statutes 6:54, 328, which are applicable to banks organized under the laws of the State of Louisiana. Intervening defendant otherwise denies the allegations of Paragraph 9 and avers that said statutory provisions have

no application whatsoever to the matters herein sued upon.

(10) Intervening defendant is informed and believes that the officers of Whitney National Bank of New Orleans have at least some familiarity with the National Banking Act and the laws of Louisiana pertaining to banks, as a general proposition. Intervening defendant is not in a position to admit or otherwise deny the allegation with respect to the Comptroller of the Currency. The allegations contained in Paragraph 10 are otherwise denied.

(11) The allegations contained in Paragraph 11 are denied.

(12) Intervening defendant denies the allegations of Paragraph 12 except to admit that Whitney National Bank of New Orleans, Crescent City National Bank, and Whitney Holding Company participated in a reorganization program, all of the phases of which received the required approvals of the appropriate regulatory authorities. In addition, intervening defendant avers that Crescent City National Bank was properly organized and received due approval of and a certificate of authority to commence business from the Comptroller of Currency, which action on the part of the Comptroller of Currency was in an area committed to the sole discretion of that office, and is not subject to judicial review. Intervening defendant avers also that the matters alleged in Paragraph 12 have no bearing whatsoever on the cause of action herein sued upon.

(13) The allegations of Paragraph 13 are denied, and it is specially averred that Title 12, United States Code, Section 1845 has no relevancy whatsover to the matters herein sued upon.

(14) The allegations of Paragraph 14 are denied.

(15) The allegations of Paragraph 15 are denied, except to admit that all due approvals were obtained with respect to the organization of Crescent City National Bank, and that the approval of the Comptroller of Currency contemplated some action on the part of the Federal Reserve System, the approval of which body was ultimately obtained.

(16) The allegations of Paragraph 16 are admitted, and intervening defendant specially avers that the Federal Reserve Board gave notice of said application to the public as required by law.

(17) It is admitted that the Comptroller of Currency notified the Federal Reserve System recommending approval of the acquisition by Whitney Holding Company of the stock

of Whitney National Bank of New Orleans and that of the intervening defendant. The remaining allegations of Paragraph 17 are denied, and intervening defendant specially avers that the Board of Governors of the Federal Reserve System did not "forego the holding of a formal, statutory hearing on the application", as is averred by plaintiff, but, to the contrary, held a formal hearing after due legal notice and following press releases, including releases in newspapers of general circulation in the City of New Orleans, all of which were available to plaintiffs and contained the date of the hearing as scheduled and ultimately held on January 17, 1962. The fact of the holding of such hearing was well known to plaintiffs despite their allegations to the contrary, in view of the quotation from the transcript of said hearing as appears in Paragraph 17 of plaintiffs' complaint.

(18) The allegations of the first sentence of Paragraph 18 are denied, except to admit that the Federal Reserve System on May 3, 1962, did issue an order, copy of which is attached hereto as Exhibit A. Intervening defendant specially denies that said approval in any way involved the approval of the establishment of a "new branch in Jefferson Parish, Louisiana".

Intervening defendant denies the remaining allegations of Paragraph 18 for lack of sufficient information to justify a belief.

(19) It is admitted that defendant, The Comptroller of Currency, on May 18, 1962, confirmed his formal approval of the consolidation of Whitney National Bank of New Orleans and Crescent City National Bank, which became effective on May 24, 1962, and that a certificate of authority to do business as a national bank was issued to Crescent City National Bank as of May 24, 1962. The allegations of Paragraph 19 are otherwise denied. Intervening defendant specially avers that it is a duly organized banking institution under the national banking laws, that it has complied with law in all respects, and has been recognized by the Comptroller of Currency and that it is presently awaiting the issuance of a formal certificate of authority from the Comptroller of Currency in order that it might commence business in the Parish of Jefferson, State of Louisiana. Intervening defendant is not itself a branch bank or branch facility, and there is no pending application of intervening defendant or of Whitney National Bank of New Orleans to

establish a branch bank in the Parish of Jefferson, State of Louisiana. Intervening defendant is informed and believes that Whitney Holding Corporation, a corporation duly organized under the laws of the State of Louisiana and subject to regulation under 12 U.S.C. Sections 1841-1848, has no intention of establishing or attempting to establish or of applying for authority to establish a "branch bank" or "branch banking facilities" in the Parish of Jefferson, State of Louisiana, inasmuch as said corporation is not a "bank" or "banking institution".

(20) The allegations contained in Paragraph 20 are denied.

(21) It is admitted that the figures recited in Paragraph 21 are substantially correct. The allegations of said paragraph are otherwise denied.

Third Defense

(1) All action taken by intervening defendant, Whitney National Bank of New Orleans, Crescent City National Bank, and Whitney Holding Company, in connection with the matters herein sued upon and matters relating thereto has been taken openly and with full disclosure of all relevant facts and without subterfuge of any kind.

(2) The organization of the intervening defendant in no way circumvents, and its commencement of the business of banking in Jefferson Parish, Louisiana, would in no way circumvent the provisions and purposes of the National Banking Act, but are entirely consistent therewith and authorized thereby. The purpose of the organization of the intervening defendant was to furnish Jefferson Parish the additional local banking facilities urgently needed and sought by those residing and doing business in said Parish, as well as to give Whitney Holding Corporation and its stockholders an opportunity to share in the potential growth offered to banks serving said Parish.

(3) The banking facilities to be established by intervening defendant will not in any way or for any purposes constitute a "branch" or "branch facility" of either Whitney National Bank of New Orleans or Whitney Holding Corporation, but intervening defendant is a legal entity separate and distinct from Whitney National Bank of New Orleans and Whitney Holding Corporation.

(4) The issuance to intervening defendant by defendant,

Comptroller of Currency, of a certificate of authority to commence the business of banking will be in accordance with the applicable provisions of the National Bank Act (12 U.S.C. 21-27) and will be within the authority and discretion vested thereby in said defendant.

(5) Plaintiff, Guaranty Bank and Trust Company, is located in and serves a community many miles from the metropolitan area of New Orleans and in no way served by banks in Jefferson Parish.

(6) Plaintiff, Merchants Trust and Savings Bank, operates in Jefferson Parish, but is controlled by Louis J. Roussel who also controls National American Bank in New Orleans, a competitor of Whitney National Bank of New Orleans.

(7) The Bank of New Orleans and Trust Company does not operate in Jefferson Parish at all, and is already faced with competition in Jefferson Parish in the form of plaintiff, Merchants Trust and Savings Bank, as commonly controlled with the National American Bank in New Orleans, and also from National Bank of Commerce in Jefferson Parish, an established affiliate of the National Bank of Commerce in New Orleans. The attorneys appearing in this proceeding on behalf of plaintiff, Bank of New Orleans and Trust Company, are also attorneys for National Bank of Commerce in New Orleans.

(7) In good faith and in compliance with all applicable laws, and with notice to all parties and after public investigation and hearings, intervening defendant has been organized with great effort and great expense. Intervenor's charter has been issued and intervenor is competely legally organized. The following further steps have been taken by intervenor:

(a) It has elected its directors and officers.
(b) It has designated a full complement of clerks and tellers ready to commence work.
(c) It has purchased premises and commenced construction.
(d) It has leased temporary quarters.
(e) It has subscribed and paid for Federal Reserve membership stock.
(f) It has printed many of its forms, checks, stationery and incurred other substantial expenses.
(g) It has represented to the public that it will be open for business momentarily.

WHEREFORE, intervening defendant prays:

(1) That the court enter a judgment declaring and adjudging that defendant, Comptroller of Currency, is authorized and empowered by the provisions of the National Banking Act (12 U.S.C. 21-27) in his sole discretion to issue to intervening defendant a certificate of authority to commence the business of banking in Jefferson Parish, Louisiana.

(2) That the court deny the prayer of plaintiffs' complaint for a permanent injunction and a preliminary injunction against defendant.

UNITED STATES OF AMERICA

BEFORE THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

Washington, D. C.

In the Matter of the Application of: WHITNEY HOLDING CORPORATION for approval of its becoming a bank holding company by acquiring the stock of Crescent City National Bank, New Orleans, Louisiana, and Whitney National Bank in Jefferson Parish, Jefferson Parish, Louisiana

ORDER APPROVING APPLICATION UNDER BANK HOLDING COMPANY ACT

There has come before the Board of Governors, pursuant to section 3(a)(1) of the Bank Holding Company Act of 1956 (12 USC 1842) and section 222.4(a)(1) of Federal Reserve Regulation Y (12 CFR 222.4(a)(1)), an application on behalf of Whitney Holding Corporation, New Orleans, Louisiana, for the Board's prior approval of action whereby Whitney Holding Corporation would become a bank holding company by acquiring substantially all of the voting stock of (1) the Crescent City National Bank, New Orleans, Louisiana (a proposed new bank), into which would be consolidated the existing Whitney National Bank of New Orleans, under the latter title, and (2) the Whitney National Bank in Jefferson Parish, Jefferson Parish, Louisiana (a proposed new bank). A Notice of Receipt of Application was published in the Federal Register on July 28, 1961 (26 Federal Register 6792), which provided an oppor-

tunity for submission of comments and views regarding the proposed acquisitions, and the time for filing such comments and views has expired and all comments and views filed with the Board have been considered by it. Pursuant to Order published in the Federal Register on December 23, 1961 (26 Federal Register 12312), a public proceeding with respect to the application was held before the Board on January 17, 1962 to provide a further opportunity for the expression of views and opinions by interested persons.

It is Ordered, for the reasons set forth in the Board's Statement of this date, that said application be and hereby is granted, provided that the acquisitions approved herein shall not be consummated (a) sooner than seven calendar days after the date of this Order or (b) later than three months after said date, and provided further that Whitney National Bank in Jefferson Parish shall be opened for business within six months after said date.

Dated at Washington, D. C., this 3rd day of May, 1962.

By order of the Board of Governors.

Voting for this action: Chairman Martin, and Governors Balderston, Mills, Shepardson, King, and Mitchell.

Voting against this action: Governor Robertson.

MERRITT SHERMAN,
Secretary.

(Seal).

Filed July 10, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

[Title omitted]

ORDER ALLOWING WHITNEY NATIONAL BANK IN JEFFERSON PARISH TO INTERVENE AS A DEFENDANT

The Whitney National Bank in Jefferson Parish having moved the Court for leave to intervene as a defendant in this action, and such motion having come on to be heard on July 6, 1962, and at the hearing counsel for the plaintiffs and for the defendant Comptroller of the Currency having orally consented to the granting of such motion, it is hereby

Ordered that the Whitney National Bank in Jefferson Parish have leave to intervene in this cause and that said bank be and the same hereby is made an additional party defendant herein, and it is

Further Ordered that the Answer of such intervening defendant, presently attached as an exhibit to the motion for intervention, may be filed in the Clerk's office in the same manner and with the same effect as if such intervening defendant had been named as an original party to this cause, and it is

Further Ordered that the caption of this action shall hereafter read as follows:

BANK OF NEW ORLEANS AND TRUST COMPANY, GUARANTY BANK AND TRUST COMPANY, *Plaintiffs*,

BANK OF LOUISIANA IN NEW ORLEANS, *Intervening Plaintiff*,

v.

JAMES J. SAXON, Comptroller of the Currency, *Defendant*,

WHITNEY NATIONAL BANK IN JEFFERSON PARISH, *Intervening Defendant*.

Done this — day of July, 1962.

/s/ ALEXANDER HOLTZOFF,
United States District Judge.

Filed July 10, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT OF PRELIMINARY INJUNCTION

The motion of plaintiffs for a preliminary injunction having come on for hearing on July 6, 1962, and the Court having considered the Complaint herein, the affidavits filed in support of and in opposition to the motion, the evidence in the form of written exhibits submitted during the aforementioned hearing, and having heard oral argument of

counsel, hereby makes the following findings of fact and conclusions of law:

Findings of Fact

1. The defendant, James J. Saxon, Comptroller of the Currency proposes to issue, during the pendency of this action and before same can be heard and determined on its merits, a certificate of authority pursuant to 12 U.S.C. § 27 to the intervening defendant herein, Whitney National Bank in Jefferson Parish, which would enable it to open and operate banking facilities in Jefferson Parish, Louisiana.

2. Plaintiffs contend that the issuance of said certificate of authority would be unlawful and contrary to 12 U.S.C. § 36, 1845 and 1846 and Louisiana Revised Statutes, Title 6, Section 54.

3. Plaintiffs contend further that the issuance of said certificate would cause each to sustain irreparable injury and damages to its banking business and properties emanating from said Jefferson Parish, Louisiana and it appears that such injury and damages to plaintiffs may exceed the sum of $10,000, and that plaintiffs are without any adequate remedy at law.

4. The granting of a preliminary injunction is necessary to preserve the status quo until the merits of the case can be decided.

Conclusions of Law

1. This Court has jurisdiction over this action under 28 U.S.C. § 1331.

2. Plaintiffs are entitled to a preliminary injunction restraining the defendant Comptroller of the Currency from issuing a certificate of authority to the Whitney National Bank in Jefferson Parish for the opening and operation of banking facilities in Jefferson Parish, Louisiana until this action can be heard and determined on its merits.

Done this 10 day of July, 1962.

/s/ ALEXANDER HOLTZOFF,
United States District Judge.

Filed July 10, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

[Title omitted]

PRELIMINARY INJUNCTION

This cause came on to be heard on plaintiffs' motion for a preliminary injunction and the Court having considered the Complaint, the affidavits submitted in support of said motion and in opposition thereto, the exhibits submitted to the Court during the hearing of the motion, and having heard counsel, and, it appearing to the Court after due deliberation that unless a preliminary injunction is granted herein, defendant James J. Saxon, Comptroller of the Currency may, before this action can be determined on its merits, issue a certificate or certificates authorizing defendant Whitney National Bank in Jefferson Parish, or persons or corporations in active concert and participation with said defendant, to open and operate banking facilities in Jefferson Parish, State of Louisiana, to the irreparable injury and damage of the plaintiffs herein, and the Court having made and filed its findings of fact and conclusions of law, it is this 10 day of July, 1962,

Ordered, that defendant James J. Saxon, Comptroller of the Currency, his agents, servants, employees and attorneys, be and they hereby are restrained and enjoined, pending the determination of this action or until further order of this Court, from issuing or delivering any certificate, pursuant to 12 U.S.C. § 27 or otherwise, to defendant Whitney National Bank in Jefferson Parish, or to any person, or corporation in active concert or participation with said Whitney National Bank in Jefferson Parish, authorizing the opening and operation by them or any of them of new branch bank or banking facilities within the limits of Jefferson Parish, State of Louisiana; provided that plaintiffs give security in the sum of $50,000 for the payment of such costs and damages as may be incurred or

suffered by Whitney National Bank in Jefferson Parish who is found to have been wrongfully enjoined, such bond to be submitted no later than the 17th day of July, 1962.

/s/ ALEXANDER HOLTZOFF,
United States District Judge.

Filed July 11, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

[Title omitted]

MOTION OF DEFENDANT COMPTROLLER OF THE CURRENCY FOR SUMMARY JUDGMENT

Comes now the defendant Comptroller of the Currency, by his undersigned counsel, and moves the Court to enter summary judgment in his favor on the grounds that there is no genuine issue herein as to any material fact and that he is entitled to judgment as a matter of law. Attached in support of this motion are the statement required by Local Civil Rule 9(h) and a memorandum of points and authorities.

In further support of this motion, specific reference is here made to the affidavit of James J. Saxon, filed on June 20, 1962, and to defendant's memoranda filed on June 20, June 26, and July 3, 1962, in opposition to the previous motion for preliminary injunction. General reference is also made to the other papers on file in this action, since a motion for summary judgment searches the entire record before the Court.

/s/ JOSEPH D. GUILFOYLE,
Acting Assistant Attorney General.

/s/ DONALD B. MACGUINEAS,
/s/ DAVID V. SEAMAN,
Attorneys, Department of Justice
Attorneys for Defendant Comptroller of the Currency.

Of Counsel:

DAVID C. ACHESON,
United States Attorney.

Filed July 11, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

[Title omitted]

STATEMENT OF DEFENDANT COMPTROLLER OF THE CURRENCY PURSUANT TO LOCAL CIVIL RULE 9(h)

The defendant Comptroller of the Currency, pursuant to Local Civil Rule 9(h), submits the following statement of the material facts as to which he contends there is no genuine issue in this case:

1. On October 3, 1961, the Comptroller of the Currency gave preliminary approval to the formation of two new national banks, the Crescent City National Bank and the Whitney National Bank in Jefferson Parish, subject to approval by the Federal Reserve Board of the formation of a holding company for the purpose of acquiring the stock of such banks, pursuant to the Bank Holding Company Act of 1956.

2. On May 3, 1962, the Federal Reserve Board approved the application of Whitney Holding Corporation to become a bank holding company by acquiring the stock of the Crescent City National Bank and the Whitney National Bank in Jefferson Parish.

3. On May 18, 1962, the Comptroller of the Currency approved the consolidation of the existing Whitney National Bank in New Orleans into the Crescent City National Bank under the name Whitney National Bank in New Orleans. This consolidation was accomplished on May 24, 1962.

4. On May 24, 1962, the Whitney Holding Corporation, which had been previously organized under Louisiana law, completed the organization of the Whitney National Bank in Jefferson Parish by purchasing all of its stock (except for directors' qualifying shares) for $650,000.00. Bylaws were adopted and the directors and officers were elected.

5. The Articles of Association and the Certificate of Organization of the Whitney National Bank in Jefferson

Parish have been executed and filed with the Comptroller of the Currency pursuant to 12 U.S.C. 24, and thereupon the Whitney National Bank in Jefferson Parish became a new national bank and a body corporate.

6. The present suit was filed on July 9, 1962, just as the Comptroller of the Currency was about to issue a Certificate of Authority pursuant to 12 U.S.C. 27, permitting the Whitney National Bank in Jefferson Parish to commence banking operations.

/s/ JOSEPH D. GUILFOYLE,
Acting Assistant Attorney General.

/s/ DONALD B. MACGUINEAS,
/s/ DAVID V. SEAMAN,
Attorneys, Department of Justice
Attorneys for Defendant Comptroller of the Currency

Of Counsel:

DAVID C. ACHESON,
United States Attorney.

Filed July 16, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

[Title omitted]

OFFICIAL TRANSCRIPT OF PROCEEDINGS

Vol: 1 Prepared for: Court

Date: July 6, 1962

GERALD NEVITT,
Official Reporter,
U. S. Court House,
Washington 1, D. C.,
STerling 3-5700,
Extension 274.

[1] UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

BANK OF NEW ORLEANS AND TRUST COMPANY, MERCHANTS TRUST AND SAVINGS BANK, GUARANTY BANK AND TRUST COMPANY, *Plaintiffs*,

vs.

JAMES J. SAXON, Comptroller of the Currency, Washington, D. C., *Defendant*.

Washington, D. C.
Friday, July 6, 1962.

The above cause came on for hearing of motions before The Honorable Alexander Holtzoff, Judge, United States District Court for the District of Columbia.

APPEARANCES:

On behalf of Plaintiff Bank of New Orleans & Trust: Edward L. Merrigan, Esq., A. J. Waechter, Esq.

On behalf of Plaintiff Guaranty Bank & Trust: James W. Bean, Esq.

On behalf of Intervening Plaintiff Bank of Louisiana In New Orleans: G. Harrison Scott, Esq.

[2] On behalf of Defendant James J. Saxon: David V. Seaman, Esq., Department of Justice. Robert Bloom, Esq., Chief Counsel, Comptroller of the Currency.

On behalf of Intervening Defendant Whitney National Bank In Jefferson Parish: Malcolm L. Monroe, Esq., Hamilton Carothers, Esq.

[3] PROCEEDINGS

The Deputy Clerk: Bank of New Orleans vs. Saxon.

Mr. Merrigan: Your Honor, may I introduce to the Court some counsel from out of the District of Columbia who have appeared here on the motion this morning?

The Court: Very well.

Mr. Merrigan: Of course, I am Mr. Merrigan, representing the Bank of New Orleans & Trust Company, one of the plaintiffs.

Mr. A. J. Waechter, of the Louisiana Bar, is here to represent the Bank of New Orleans & Trust Company.

Mr. James W. Bean, of Lafayette, Louisiana, is here to represent the Guaranty Bank and Trust Company of Lafayette, Louisiana.

Mr. G. Harrison Scott, of New Orleans, is here to represent another plaintiff, The Bank of Louisiana In New Orleans.

On the other side of the table, Your Honor—

The Court: Just a moment. It is not sufficient to introduce them. You have to move that they be admitted pro hac vice.

Mr. Merrigan: Your Honor, I so move, for the attorneys appearing on behalf of the plaintiffs, and I would like to make the same motion, if I might, for Mr. Malcolm [4] Monroe——

The Court: Yes, but will you also state of what state bar each counsel is a member, so we have a record of that.

Mr. Merrigan: Yes, Your Honor. Mr. Waechter is an attorney of the Louisiana Bar. Mr. Bean is a member of the Bar of the State of Louisiana. Mr. Scott is a member of the Bar of the State of Louisiana. Mr. Malcolm Monroe, representing the proposed intervenor, applicant for intervention, is a member of the Bar of the State of Louisiana.

Mr. Seaman: Your Honor, Mr. Monroe is also a member of the Bar of the District of Columbia.

Mr. Merrigan: I didn't know this, Your Honor.

The Court: Then you do not have to move his admission.

Mr. Merrigan: No, Your Honor.

Mr. Seaman: Your Honor, if I may, I am David Seaman, of the Department of Justice. Before we start, I would like to make a matter of procedure as to these motions.

Your Honor, there are three motions before you, as I understand it, this morning. The motion that is set down first is the motion for preliminary injunction. The second motion is the motion of the Whitney National Bank to intervene as a defendant. That motion has been pending for some time, Your Honor.

[5] The Court: You say motion for preliminary injunction. What is the next motion?

Mr. Seaman: The motion of the Whitney National Bank In Jefferson Parish, Your Honor, to intervene as a defendant. They are the bank, Your Honor, that want the certificate from the Comptroller.

The Court: Just tell me what the motions are, first.

Mr. Seaman: Yes, Your Honor. That is the second. And the third is the motion of one of the plaintiffs to withdraw. That is not opposed, Your Honor, and as far as I know it can be granted immediately.

The Court: A motion to withdraw what?

Mr. Seaman: They are one of the three plaintiffs, Your Honor——

The Court: You say motion to withdraw. Motion to withdraw what?

Mr. Seaman: It is one of three plaintiffs, Your Honor. They want to withdraw as a plaintiff.

The Court: In other words, they want to dismiss the action as to them?

Mr. Seaman: Yes, Your Honor.

The Court: Is there any opposition to that?

Mr. Seaman: None whatsoever, and I have a proposed order, Your Honor.

[6] The Court: Suppose you submit an order to that effect. I think the motion for leave to intervene should be heard before the motion for an injunction.

Mr. Seaman: Yes, Your Honor, that is our position.

Mr. Merrigan: Your Honor, we will consent to the intervention of the Whitney National Bank In Jefferson Parish, provided, of course—which we have the right to do under the rules—we can move at some later time to add the parent bank, Whitney National Bank of New Orleans. I won't press this on the Court at this time because I think it will become——

The Court: As I understand it from Mr. Seaman's statement, there are two motions before me, two contested motions; is that correct?

Mr. Seaman: Yes, Your Honor.

The Court: One motion for preliminary injunction and the other is a motion for leave to intervene.

Mr. Merrigan: But we withdraw——

The Court: I think it would be appropriate to hear the second motion first, would it not?

Mr. Seaman: Yes, Your Honor.

Mr. Merrigan: Yes, Your Honor, and we are trying to expedite the proceedings because I think the real important matter before the Court is the motion for preliminary injunction.

[7] The Court: Is there any opposition to the motion for leave to intervene?

Mr. Merrigan: We withdraw our opposition to that.

The Court: Is the Government opposing it?

Mr. Seaman: Certainly not, Your Honor.

The Court: Very well, then, that will be granted by consent.

Mr. Monroe: Your Honor, could I point out we endeavored to intervene some time ago and we were vigorously opposed. I just want to point that out.

The Court: That has become an academic question.

Mr. Monroe: I understand, Your Honor.

The Court: Who is the intervention petitioner? Who is the intervenor?

Mr. Seaman: Your Honor, the intervenor is the Whitney National Bank In Jefferson Parish. They are the ones that want the certificate.

The Court: I see. Very well. So, there is just one matter before me to be argued now, the motion for preliminary injunction.

Mr. Seaman: Yes, Your Honor.

The Court: Against the Comptroller of the Currency.

Mr. Seaman: Yes.

The Court: Very well, I will hear the motion.

[8] Mr. Merrigan: Your Honor, this is a motion for preliminary injunction to restrain the Comptroller of the Currency pendente lite from issuing a certificate under the National Banking Act, Title 12 United States Code, for the opening and operation of banking facilities in Jefferson Parish, Louisiana, by either the Whitney National Bank of New Orleans, which is a bank located in the City of New Orleans, Parish of Orleans, or by the so-called Whitney Holding Corporation or by the Whitney National Bank In Jefferson Parish, which has just been admitted to these proceedings by intervention.

The Court: Just a moment. I am afraid you got ahead of me a little bit. The injunction is requested against the Comptroller of the Currency against issuing a certificate to whom?

Mr. Merrigan: To any one of those three banks, the Whitney National Bank of New Orleans, the Whitney Holding Corporation, or the so-called Whitney National Bank In

Jefferson Parish, the party who has just been allowed to intervene.

And, of course, the basis of our opposition against the intervention previously was that the real party in interest was the Whitney National Bank of New Orleans or the Whitney Holding Corporation.

Now, Your Honor, when this matter came on before [9] Judge Hart on June 27th, a temporary restraining order was issued, holding the certificate of the Comptroller in abeyance until today; and, of course, the temporary restraining order expires today and we are here, of course, on the motion for preliminary injunction.

The plaintiffs contend——

The Court: Of course, a temporary restraining order is not an adjudication of any kind. It is issued ex parte and all it is intended to do is to hold matters in status quo for ten days, that is all.

Mr. Merrigan: Well, in this case, Your Honor, that is entirely true; but in this case it was granted on notice and after argument of some kind before the Court.

The Court: That does not make any difference. That is the only effect a temporary restraining order has.

Mr. Merrigan: Entirely correct, Your Honor.

Now, plaintiffs contend, Your Honor, to sharpen the issues here, that under the facts of this case the opening of banking facilities in Jefferson Parish, Louisiana, and the granting of the certificate by the Comptroller are unlawful under the following provisions of law:

First, Section 36 of the National Bank Act, which is Title 12, 36 (c). Under the statutes of Louisiana, Revised Statute 6:54, which was passed by the State of Louisiana [10] in pursuance of Section 36 of the National Bank Act. And I will——

The Court: Now suppose, if you don't mind, you make your references to the United States Code rather than to the constituent statute. We always use the Code because it is not practical to have a copy of every possible statute. You refer to 12 United States Code, section what?

Mr. Merrigan: It is Title 12 United States Code, Section 36.

The Court: You may proceed.

Mr. Merrigan: Section 36 (c) provides that a national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches

beyond the limits of the city in which its main office is located, if such establishment and operation are at that time expressly authorized to state banks by the law of the state in question.

The Court: Where are you reading from? I have the statute here.

Mr. Merrigan: 12 United States Code, Section 36 (c), Your Honor.

The Court: Yes, but it is a very long section, very long sub-section. What part of it were you reading from?

Mr. Merrigan: I am quoting from (c)(1) and (c)(2).

[11] The Court: Yes.

Mr. Merrigan: And that says, of course, Your Honor, that a national bank which has a main office in the City of New Orleans, Parish of Orleans, can open a branch bank beyond the City of New Orleans, Parish of Orleans, only if the laws of the State of Louisiana expressly permit state banks to do the same thing; and the statute as passed by Congress says that the state statute involved must authorize the opening of that branch by language specifically granting such authority affirmatively and not merely by implication or recognition.

The Court: Where are you reading from now?

Mr. Merrigan: (c)(2), Your Honor.

The Court: Yes.

Mr. Merrigan: Now if I could direct Your Honor's attention to Sub-section (f) of Section 36, which is on the next page, that section defines a branch, and it says that a branch as used in this section shall be held to include any branch bank, branch office, branch agency, additional office or any branch place of business located in any state of the United States.

In other words, Your Honor, Congress has left to the states complete control over branch banking under Section 36. They say that a national bank which is chartered into [12] business by the Comptroller of the Currency can open branches only if the state banks chartered by the laws of the various states can do the same thing.

The Court: Now, what does the Comptroller of the Currency propose to do that you seek to have enjoined?

Mr. Merrigan: The Comptroller of the Currency proposes to issue a certificate authorizing the Whitney National Bank of New Orleans, which is the largest bank in the State of Louisiana, larger than all—as large as all the banks com-

bined in the City of New Orleans—to open a branch, we say, in Jefferson Parish, contrary to Section 36 and contrary to the statutes of Louisiana.

The Court: What is your client's interest in the matter, legal interest? Is it just that they want to avoid competition?

Mr. Merrigan: Well, Section 36, Your Honor, was passed by Congress as an antitrust statute, practically. It was to prevent monopoly in banking. It was to prevent branch banking by large banks beyond the limits of a parish.

The Court: I understand, but what legal interest does your client have, other than the interest of any private citizen?

Mr. Merrigan: Well, a very, very——

[13] The Court: Let's assume that a proposed action of the Comptroller of the Currency is illegal. Let's concede that arguendo. An ordinary citizen who has no legal interest in the matter may not maintain an action to enjoin it.

Mr. Merrigan: Absolutely granted.

The Court: Now, then, what is your legal interest? What is your standing to sue?

Mr. Merrigan: We have before the Court three state banks of the State of Louisiana, two of whom have their main offices in the City of New Orleans, Louisiana, Parish of Orleans, and whose customers, to a great degree, running into millions of dollars, are located in Jefferson Parish. By state law those banks cannot open branches beyond the limits of the City of New Orleans; and, yet, the Comptroller is authorizing the largest bank, the largest national bank in the whole state, going over the parish line, opening branch facilities in Jefferson, and thereby endangering all of the property and business interests of these banks.

The Court: You have not answered my question. What legal interest does the plaintiff have to seek an injunction against an alleged illegal act of the Comptroller of the Currency? What is your standing to sue? Is it because you have additional competition, is that it?

Mr. Merrigan: No; that we will have additional [14] competition, Your Honor, but they have millions of dollars of deposits—and this is in affidavit form in conceded facts before the Court—they have millions of dollars of deposits emanating from Jefferson Parish; that is, persons resident in Jefferson Parish, firms located in Jefferson Parish. They have millions of dollars of loans to business firms located

in Jefferson Parish who come to the banks in New Orleans to make these loans and to deposit their funds.

If the Comptroller of the Currency, contrary to Section 36, contrary to the statutes of Louisiana, authorizes the Whitney National Bank, contrary to law, to open branches beyond the Parish of New Orleans, all of these tremendous banking properties of the plaintiffs will be put at the—well, they will lose tremendous amounts of——

The Court: Well, that is what I say. Your interest, in other words, is to eliminate potential additional competition, is it not?

Mr. Merrigan: No; loss of property, Your Honor.

The Court: But you don't lose any property. You lose business to a competitor. Isn't that what this amounts to?

Mr. Merrigan: Well, we have mortgages, the plaintiffs have mortgages on property located in Jefferson Parish.

The Court: Nothing is going to happen to those [15] mortgages as a result of a new bank being established?

Mr. Merrigan: If you lose the account of the borrower, if you lose the account of the depositors from Jefferson Parish, if you lose the vast amount of business that comes from Jefferson Parish, Your Honor—and we say that is the purpose of the National Bank for going there—we suffer net loss of profits, loss of resources in New Orleans.

The Court: It still comes down that you want to avoid additional competition.

It is entirely legitimate to desire to avoid additional competition, but why not say so?

Mr. Merrigan: Well, Your Honor, I want to say that that is true, of course. Naturally it is true. I think that was the purpose of Section 36, that no one would be given an upper hand on the other fellow. And that is why——

The Court: Very well, you may proceed.

Mr. Merrigan: That is why they based it on state statutes.

Now, if Your Honor please, as I pointed out, Section 36 of the National Bank Act says that branching can be done only if state law permits it. And I have here for Your Honor the revised statute, 6:54, of the Louisiana Revised Statutes, which provides that a bank can open a branch only in a parish where there are no other state banks, savings [16] banks and trust companies.

So that all parties on this motion I think concede, and they concede on the face of the briefs——

The Court: Read that Louisiana provision once more.

Mr. Merrigan: It says all banks, savings banks and trust companies having a capital of $100,000 or more may open and maintain a branch office or branch offices in parishes in which there are no state banks, savings banks and trust companies.

All parties on this motion, including the defendants, including the Government, including the Comptroller, agree that since 1930 or thereabouts it has been unlawful for any national bank or any state bank to open branches beyond its parish line because that would violate Section 36 and it would violate the provision of the Louisiana law.

The Court: Let me see the statute. Do you have the Louisiana statute?

Mr. Merrigan: Yes, we do, Your Honor.

(The document was handed to the Court by Mr. Merrigan.)

The Court: Which section is that?

Mr. Merrigan: Section 54, Your Honor.

The Court: What part of this section do you say would be violated? There are several provisions in this [17] section. This section authorizes banks having a capital of $100,000 or more to open branch offices in parishes in which there are no state banks, savings banks or loan companies.

Is it your contention that the converse follows by necessary implication, that if there are other state banks in the parish a branch office may not be maintained? Is that your——

Mr. Merrigan: That is correct, Your Honor, and that is conceded by the parties before the Court.

The Court: I see. Very well, proceed. I think I get your point.

Mr. Merrigan: Now, Your Honor, we refer, too, so that Your Honor might have the full picture that is before the Court, we refer, too, to violations of the Federal Bank Holding Company Act, which is found at Title 12, United States Code, 1841 et seq., and particularly, Your Honor, Section 1845 and Section 1846.

Section 1845 provides that after May 9, 1956, it shall be unlawful for a bank to invest any of its funds in the capital stock, bonds, debentures or other obligations of a bank

holding company of which it is a subsidiary or of any other subsidiary of such bank holding company.

Section 1846 of Title 12, entitled Reservation of Rights to States, says the enactment by the Congress of this [18] chapter shall not be construed as preventing any state from exercising such powers and jurisdiction which it now has or may hereaffter have with respect to banks, bank holding companies and subsidiaries thereof.

Now, if it please the Court, Whitney National Bank of New Orleans, which, as I pointed out to the Court, is the largest bank in the State of Louisiana and just about one of the largest in the entire south—it has $500,000,000 in resources, about $14,000,000 in undivided profits, about $27,000,000 in its surplus account, and now holds approximately 45 per cent of all deposits in all banks in the City of New Orleans combined—knew that it could not under any circumstances legally open a branch, as I pointed out before, beyond the limits of the parish or county of Orleans in Jefferson Parish.

The facts before the Court, which are largely conceded, and the defendents' exhibits which are before the Court, which I will refer to in just a moment, show that the Whitney National Bank started several years ago to consider ways and means by which it could circumvent Section 36 of the National Bank Act and get a branch office over in Jefferson Parish, Louisiana.

For example, Your Honor, before the Court is Defendent's Exhibit 4, which is testimony given by the President [19] of the Whitney National Bank of New Orleans before the Federal Reserve Board. I have a copy of that defendant's exhibit, Your Honor, if you would like to see it.

(The document was handed to the Court by Mr. Merrigan.)

Mr. Merrigan: This is what the President of the Whitney National Bank of New Orleans said, at pages 6 through 9, Your Honor:

> "The parish in our state is equivalent to a county," he said.
>
> "Under present laws in our state, the Whitney is not permitted to establish branches outside the Parish of Orleans.
>
> "There is a rapidly growing industrial area in adjoining Jefferson Parish up river from Orleans."

He goes on to say:

> "The industrial development, in the form of large plants, more or less extends up river on both sides"—that is the Mississippi River running up through Louisiana—"to Baton Rouge, about 80 miles.
>
> "There is, therefore, good reason to look forward to continued industrial growth along the river [20] with a concentration of small industries in Jefferson Parish.
>
> "The management of the Whitney National Bank has been studying and weighing alternative methods of entering Jefferson Parish to serve our present customers and to participate in the further growth of that area."

And now he goes on to say this, Your Honor, and we are coming right to the heart of this case:

> "The officers of the Whitney National Bank determined in 1960 that the holding company was the proper solution, provided we could put the ownership of the present Whitney National Bank of New Orleans stock into such a company and, by the use of Whitney assets, establish a bank in Jefferson Parish, which would likewise be fully owned by the holding company."

Now, if the Court please, the plan——

The Court: May I ask you a question before you proceed?

Mr. Merrigan: Yes, Your Honor.

The Court: To pinpoint this matter, what is the precise nature of the certificate which the Comptroller of the Currency proposes to issue?

Mr. Merrigan: He proposes to issue a certificate to the Whitney National Bank in Jefferson Parish, which the [21] plaintiffs say will be a branch bank of the Whitney National——

The Court: I know, but that is not what I asked you. What is the precise certificate? I am not asking what your construction is. I know you construe it as creating a branch bank, but what actually does it do, technically?

Mr. Merrigan: It is a certificate authorizing the Whitney National Bank In Jefferson Parish—which I am about to show Your Honor how it was organized, with what funds and how—to open banking facilities in Jefferson Parish.

The Court: Well, would it in so and so many words

authorize the Whitney National Bank to open a branch or an office in Jefferson Parish?

Mr. Merrigan: No.

The Court: That is what I want to know. What will it do?

Mr. Merrigan: No, it doesn't.

The Court: What does it do?

Mr. Merrigan: It authorizes them to open the same thing as a branch.

The Court: I know, but I want to know what the certificate does. I don't want your construction of it. First tell me what it does in precise language.

Mr. Merrigan: I don't have the certificate before me because, of course, there is no certificate as yet; it is [22] restrained.

The Court: I know, but what is the application that has been presented to the Comptroller? What does it seek?

Mr. Merrigan: It seeks to open a bank in Jefferson Parish by the Whitney National Bank in Jefferson Parish.

The Court: Well, I didn't so understand it from the testimony that you just read. I thought that the Whitney National Bank seeks to create a holding company.

Mr. Merrigan: That is correct.

The Court: Which, in turn, would own stock in another bank to be established in Jefferson Parish.

Mr. Merrigan: That is correct.

The Court: Well, that is different, isn't it, from authorizing the establishment of a branch of the Whitney National Bank?

Mr. Merrigan: Well, if that is different, Your Honor, then Section 36 will be repealed, because any bank could do it that way.

The Court: But why didn't you tell me? I have been trying to ascertain just what the application of Whitney National Bank was in precise terms.

Mr. Merrigan: That is exactly what I wanted to hand to Your Honor.

[23] The Court: You have been telling me that the Whitney National Bank, or that the Comptroller of the Currency proposes to issue a certificate authorizing the establishment of a branch, and of course it seemed to me strange that the Comptroller of the Currency would violate the express provision of law. Now it appears he does not propose to do that at all; he proposes to authorize the

creation of a holding company which would own the stock of a bank.

Mr. Seaman: Excuse me, Your Honor——

The Court: Is that correct?

Mr. Seaman: That is not precisely correct, Your Honor, no.

The certificate is to the Whitney National Bank In Jefferson Parish directly; it is not to the holding company. The holding company is a state corporation.

The Court: But it will be a different bank, not a branch of the Whitney National Bank?

Mr. Seaman: Precisely, Your Honor.

Mr. Merrigan: Except, Your Honor, that we are going to be talking about some law that is well established that makes——

The Court: I know, Mr. Merrigan, but before I can construe what a transaction amounts to I have to know what the form of the transaction is, and you have been telling me [24] all this time that the Comptroller of the Currency proposes to authorize the Whitney National Bank to establish a branch in Jefferson Parish when he does not do that at all.

Mr. Merrigan: Well, Your Honor, you will recall that I directed your attention to section (f), I believe it was, of Section 36, which defines a branch to be any additional office of another bank.

The Court: Yes, but as I understand it, this is a separate corporation, a separate banking institution.

Mr. Merrigan: Well, except, Your Honor, if you would please permit me to move to the next step.

The Court: Yes, you may proceed, but it took me an awful long time to find out what the form of the transaction was.

Mr. Merrigan: Well, I am going to be honest with you, it took me a long time to understand it, too.

The Court: I know, but I think you can help the Court by being more exact.

You may proceed.

Mr. Merrigan: Now, I just quoted to Your Honor language of the President of the Whitney National Bank which said that under present laws they were not permitted to branch, that they had been studying alternative methods of getting into Jefferson for years, and that they finally decided that the [25] holding company was the proper solu-

tion, provided we could put the ownership of the present Whitney National Bank of New Orleans into such a company, that is, a holding company, and by use of Whitney National Bank of New Orleans funds establish a bank in Jefferson Parish which would likewise be fully owned by the holding company.

Now, before Your Honor is an exhibit which we made up from another exhibit which has been introduced into this action by the defendant himself.

(The document was handed to the Court by Mr. Merrigan.)

Mr. Merrigan: On the second page of this so-called reorganization plan we have the various steps by which the Whitney National Bank of New Orleans went about getting this bank into Jefferson Parish.

Step one, Your Honor, we find the Whitney National Bank of New Orleans with 112,000 shares of stock, taking $350,000 of its own capital out of its capital account and forming the so-called Whitney Holding Corporation. Now, that is the first place that Section 1845 of Title 12 comes into play.

Now, we have the Whitney National Bank of New Orleans, with its holding corporation, with $350,000 of its own capital, receiving 5600 shares of the holding corporation [26] for that $350,000 cash investment.

In step two, the Whitney Holding Corporation then creates an organization known as the Crescent City National Bank, which also has 112,000 shares. And the holding corporation takes the $350,000 it got from the Whitney National Bank of New Orleans and puts it into this Crescent City National Bank and, in return, takes all of the shares of the Crescent City National Bank.

Now, Your Honor, the Crescent City National Bank never opened its doors, it is not a bank, never operated anywhere, and until step three here, where it merges with the old Whitney National Bank of New Orleans, never conducted a bank anywhere.

But the Comptroller of the Currency in this case issued a certificate authorizing the formation of the Crescent City National Bank.

The Court: Now, what do you seek to enjoin?

Mr. Merrigan: I seek to enjoin back here at step four, Your Honor, when we get to step four, because now in step three, having organized this phantom bank, a bank that doesn't exist anywhere but on paper, the Whitney National

Bank of New Orleans merges by agreement with this phantom bank and thereby eliminates any dissenting stockholders in the Whitney National Bank who don't want to go along with the plan. The [27] Whitney——

The Court: What do you mean by merges?

Mr. Merrigan: By agreement. They have a merger agreement.

The Court: You mean that separate corporate entities are eliminated, it is all one corporation now?

Mr. Merrigan: You started with the Whitney National Bank of New Orleans, it forms a holding corporation, then the holding corporation forms a phantom bank, the old bank——

The Court: Suppose we call it Crescent City instead of phantom.

Mr. Merrigan: It doesn't exist.

The Court: I do not know what you mean by a phantom.

Mr. Merrigan: It is a bank that the Comptroller has issued a certificate to, Your Honor——

The Court: But let's not use opprobrious appellations.

Mr. Merrigan: I'm sorry, Your Honor. It's a bank that exists only on paper.

The Court: Well, all banks started on paper; then they build themselves up.

Mr. Merrigan: They usually open their doors, though, and let you and me come in and make deposits and borrow [28] money. But this bank wasn't formed for that purpose.

The Court: Well, they haven't gotten that far, perhaps.

Mr. Merrigan: No, Your Honor, admittedly under the reorganization plan it was formed for one purpose only, to merge with the parent bank, Whitney National Bank of New Orleans.

The Court: What do you mean by merge? Do you mean that separate corporate entities have been eliminated and it is all one corporate entity?

Mr. Merrigan: The old bank, Whitney National Bank of New Orleans, the $500,000,000 bank in New Orleans, merges into Crescent City National Bank, which is a bank on paper. The Whitney Holding Corporation then owns all of the stock in the Whitney National Bank of New Orleans, and the Whitney National Bank in New Orleans, as merged into this Crescent City Bank, then owns all of the stock in the Whitney Holding Corporation; and any dissenting stockholders in the Whitney National Bank have been eliminated.

The Court: Then there is no merger. The separate corporate entities still exist, do they not?

Mr. Merrigan: Well, it's part of this fantastic plan, we say——

The Court: That is my difficulty with your use of [29] the term merger. A merger of two corporations means that the two separate corporate entities are eliminated and they become one corporation.

Mr. Merrigan: Well, that does happen here.

The Court: Well, in this case Crescent still remains as a separate corporate entity, does it not?

Mr. Merrigan: It survives and then changes its name back to Whitney National Bank of New Orleans. You see, this is what made it so difficult for me, Your Honor.

The Court: Well, I still don't understand what happened to Crescent. Does Whitney own all of its stock or is Crescent liquidated as a corporate entity or what?

Mr. Merrigan: All of its stock is owned by the holding corporation and the holding corporation got its stock with $350,000 of money which came from the Whitney National Bank of New Orleans.

The Court: Let's forget the amounts. What happened to the corporate structure?

Mr. Merrigan: Whitney National Bank of New Orleans, which started here, merged into this bank, Crescent City National Bank.

The Court: But what do you mean by merged? That is what I want to know. Did it buy its stock or was there an agreement of merger which eliminated the separate corporate [30] entities?

Mr. Merrigan: That is correct, Your Honor.

The Court: You know, I think it would be much clearer if you would use precise technical terminology instead of using figures of speech.

Mr. Merrigan: Well, I will in step three——

The Court: Figures of speech do have a literary flavor, but sometimes they convey wrong ideas.

Mr. Merrigan: Well, I agree, Your Honor, and I don't mean to do that.

The Court: I know you don't mean it, but it would clarify the Court's thinking if you used precise legal terminology, because the word merger, you know, can mean any one of a lot of things.

Mr. Merrigan: Your Honor, they merged by agreement.

There was an agreement between the Crescent City National Bank and the Whitney National Bank of New Orleans whereby all of the assets of the Whitney National Bank of New Orleans were taken over by the Crescent City National Bank. The Whitney National Bank of New Orleans, as it existed before that agreement——

The Court: The words taken over can mean a lot of things. Did the Whitney buy the assets of Crescent? Did it buy its stock? Or was Crescent liquidated as a corporation? [31] Any one of those things can be a taking over and sometimes the form that a transaction takes is very important.

Mr. Merrigan: I agree with Your Honor entirely.

The Court: Now, what is the form of the transaction?

Mr. Merrigan: The form of the transaction was a merger agreement between the Whitney National Bank of New Orleans and the Crescent City National Bank. By the terms of the agreement the Crescent City National Bank acquired all of the assets of the Whitney National Bank of New Orleans. The Whitney Holding Corporation was a party to that agreement. The Whitney Holding Corporation, which owned all the stock in the Crescent City National Bank by that time, acquired all the stock in the Whitney National Bank of New Orleans. In turn for this merger the Whitney National Bank of New Orleans acquired all the stock of the holding corporation, 1,129,000 shares.

The Court: What happened to the stock of Crescent?

Mr. Merrigan: The stock of Crescent was already owned at that time, under step two, by the holding corporation.

The Court: And it continues to be owned?

Mr. Merrigan: Yes.

The Court: In other words, that is not a true merger. [32] Mr. Merrigan: Really not; really not. But that is what they propose to do, and the purpose of it was to eliminate dissenting stockholders in the Whitney National Bank. Under the provisions of the National Bank Act and the Comptroller's regulations if a dissenter doesn't want to go along with a plan he can have his shares appraised or the bank can buy him out as part of the merger arrangement.

The Court: Let me see if I understand it correctly, and I want you to correct me if I am wrong. The ultimate result was that Whitney National Bank owned all of the stock of Whitney Holding Company and Whitney Holding

Company owned all of the stock of Crescent Bank, is that correct?

Mr. Merrigan: Yes, and then owned all of the stock of the Whitney National Bank.

The Court: That is no merger.

Mr. Merrigan: And then owned all of the stock of the Whitney National Bank of New Orleans. And then, Your Honor, Whitney National Bank of New Orleans as it was originally incorporated ceased to exist; it was now part of the Crescent National Bank.

The Court: Who ceased to exist?

Mr. Merrigan: The Whitney National Bank of New Orleans ceased to exist.

The Court: What happened to the Whitney National [33] Bank of New Orleans?

Mr. Merrigan: It transferred all of its assets over to the Crescent City Bank. And then the Crescent City Bank changes its name to the Whitney National Bank of New Orleans. So, we come back to where we have the Whitney National Bank of New Orleans in the corporate form of the Crescent City National Bank owning all of the stock of the holding corporation and the holding corporation owning all of the stock of the Whitney National Bank of New Orleans. And then we go to step four.

The Whitney Nafional Bank of New Orleans, as merged by agreement with Crescent, then in the form of Crescent, takes $650,000 of its capital funds and puts those $650,000 into the Whitney Holding Corporation. The Whitney Holding Corporation then uses the $650,000 it gets from the Whitney National Bank of New Orleans to organize and open the Whitney National Bank In Jefferson Parish, and, in turn, the Whitney Holding Corporation acquires all of the stock in the Whitney National Bank In Jefferson Parish.

The Court: Well, now, let me see if I understand that correctly. The ultimate result still is that the Whitney National Bank of New Orleans owns, am I correct, owns the stock of the Whitney Holding Corporation?

Mr. Merrigan: Yes, Your Honor.

[34] Mr. Bloom: As a matter of fact, Your Honor, that is not correct.

Mr. Seaman: Excuse me, Your Honor. May I speak to that?

The Court: Yes.

Mr. Seaman: Your Honor, the ownership of the holding company stock was only momentary. They gave it to the stockholders of the Whitney National Bank in exchange for the stock which they had formerly had, and the stock——

The Court: What is the present situation? Who owns the stock of the Whitney Holding Company?

Mr. Seaman: The stockholders of the Whitney Holding Corporation, Your Honor, are the former stockholders of the Whitney National Bank in New Orleans.

The Court: Who owns the stock of the Whitney National Bank?

Mr. Seaman: The new——

The Court: Of New Orleans.

Mr. Seaman: The new Whitney National Bank, Your Honor, is——

The Court: I want the present situation as of today.

Mr. Seaman: Yes, Your Honor, I am stating it. The Whitney National Bank of New Orleans is the former Crescent [35] Bank and that is one hundred per cent owned at the present time by the Whitney Holding Corporation. You see, in effect——

The Court: You mean the stock of the Whitney National Bank of New Orleans is owned by the Whitney Holding Corporation?

Mr. Seaman: Yes, Your Honor.

The Court: The former stockholders of the Whitney National Bank own the stock of the Whitney Holding Corporation?

Mr. Seaman: Yes, sir.

The Court: And the Whitney Holding Corporation owns the stock of the Whitney Bank of Jefferson Parish, is that it?

Mr. Seaman: Yes, Your Honor, that is correct.

The Court: Now, it took us pretty long to get at that.

Mr. Merrigan: I am terribly sorry, Your Honor.

The Court: You see, there are occasions when forms of a transaction are quite important.

Mr. Merrigan: Yes, Your Honor, that is true, and I apologize to the Court for not being able to get to that more quickly.

Now, of course, the result of the transaction is, as expressed by the President of the Whitney National Bank in the exhibit which is before the Court, that is, the one entitled

[36] Reorganization Plan and the letter to the stockholders dated October 28, 1961, is that the former stockholders of the Whitney National Bank of New Orleans own all of the stock in the Whitney Holding Corporation and it, in turn, owns all of the stock in the Whitney National Bank in Jefferson Parish.

The Whitney National Bank in Jefferson Parish has been organized without one cent of any new capital contribution.

The Court: But I would like to know what point you are making. Wherein is the illegality? You have been speaking for over half an hour and you haven't yet told me wherein the alleged illegality in this plan is.

Mr. Merrigan: The position of the plaintiffs in this case is that it was admittedly and concededly a violation of the law, a violation of Section 36.

The Court: I do not understand it is concededly a violation of law.

Mr. Merrigan: A direct opening of a branch is conceded to be a violation of Section 36.

We say that this was a plan, a device to circumvent Section 36 of the National Bank Act.

The Court: I see.

Mr. Merrigan: And we refer to cases, Your Honor, in our brief going back as far as Northern Securities Company, where a corporation desiring to circumvent the law formed a [37] holding company, eliminated competition and violated the provisions of the antitrust laws.

The Supreme Court of the United States in a long line of decisions emanating from 1903 forward has said when parties set out by corporate devices to circumvent the prohibitions of a statute the Court will sweep aside the corporate device used and strike down the plan as though it were accomplished directly.

And that is precisely the middle part of this case, the heart of this case. We say you can't do indirectly what you can't do directly. And if you make it complicated enough by corporate devices and corporate plans, the court, a court of equity, should go behind that device.

The Court: Is it your contention that, as a matter of fact, the money of the Whitney National Bank of New Orleans is behind the money of the Whitney National Bank of Jefferson Parish? Is that it?

Mr. Merrigan: There is no money in the Whitney Na-

tional Bank in Jefferson Parish but money emanating from Whitney National Bank of New Orleans.

The Court: Have I correctly stated your contention?

Mr. Merrigan: You have, Your Honor.

The Court: Very well. Now, is the Whitney National Bank of Jefferson County in operation now, or is it [38] awaiting the certificate?

Mr. Merrigan: No, Your Honor, it is awaiting the certificate.

And Your Honor is undoubtedly familiar with the decisions in this Circuit by Judge Youngdahl in Commercial State Bank of Roseville v. Gidney, Comptroller of the Currency; Michigan State Bank v. Gidney, Comptroller of the Currency; Camden Trust Company v. Gidney, Comptroller of the Currency.

The Court: I had one of those cases. I am not sure whether it was the Michigan case or not. I think it was a Pennsylvania case that I had.

Mr. Merrigan: These cases have all been cases—well, the first two, the Michigan State Bank case and the Commercial State Bank of Roseville, involved direct branching attempts, and this Court has uniformly struck down direct branching attempts in violation of Section 36 and has been affirmed by the Court of Appeals.

There has been a case in the Sixth Circuit, which is referred to in our brief, Wayne National Bank v. Gidney, Comptroller of the Currency, certiorari denied by the Supreme Court of the United States.

The Court: For what proposition are you citing those cases?

Mr. Merrigan: These are cases involving direct [39] violations by the Comptroller of Section 36.

The Court: I do not think you need to labor that point. The question is whether the transaction involved here constitutes a violation; isn't that it?

Mr. Merrigan: That is correct, Your Honor. The question involved here is one, really, of first impression because this is the first time, to my knowledge and my research, and I have seen nothing that the defendant has produced to show that any bank, any national bank with its own funds has sought to avoid the prohibition of Section 36 by taking its funds, putting it into a holding company and opening the bank beyond the parish line.

There was a case here involving the Camden Trust Com-

pany, a New Jersey case, and in that case individual stockholders of a New Jersey bank, I think it was the Haddonfield National Bank, as I recall it, Your Honor, individual stockholders went out and raised $500,000 of new capital, and then they, as individuals, went over beyond a county line in New Jersey and opened a new bank.

The Court: Is that the case I decided? I know I decided one of those cases.

Mr. Merrigan: No, that was Judge Walsh, I think, Your Honor.

The Court: I decided one of those cases. I have [40] forgotten which one it was.

Mr. Merrigan: In this case, which is relied on so strenuously by the defendant Comptroller here, we had a complete new raising of $500,000 of capital by the individual stockholders of the Haddonfield National Bank and they went beyond the county line and opened a new bank under a completely new name, the Delaware National Bank. And the Court said, We will affirm that. Although I want the Court to understand that there was a very sharp dissent even on that type of arrangement in the Court of Appeals. We will sustain that because you have new capital, it is not the capital of the old bank being used to open the new branch, it is new fresh capital raised by individual stockholders. And they called that an affiliate.

But in this case, Your Honor, the evidence before this Court will show, in the words of the President of the Whitney National Bank of New Orleans and in the words of the Comptroller of the Currency, the Whitney National Bank of New Orleans said, We do not want an affiliate, it's too awkward, it's too loose, it's too uncontrollable; we want a holding company so that we can approach the branch phase of it. That is the language which is in Defendant's Exhibit 4, which is before the Court. And the Comptroller, in his affidavit before this Court, says that starting back in 1960, I believe it was [41] representatives of the Whitney National Bank came to the Comptroller's office and said we want to get into Jefferson Parish, and they discussed with the Comptroller of the Currency ways and means they might accomplish that purpose. And the Comptroller said, Mr. Berry—representing the Whitney National Bank of New Orleans—you can go into Jefferson Parish by one of two routes: you can have an affiliate or you can try the holding company route. And Mr. Berry said, We don't

want an affiliate—which is the type of transaction involved in the Camden Trust Company case. He said, We want a holding company so that we can approach the branch phase of it.

And that is admitted by the sworn affidavit of the Comptroller of the Currency and by the testimony of the President of Whitney National Bank before this Court on this motion.

Now, these are exhibits (indicating), Your Honor, which have been filed by the proposed intervenor, Whitney National Bank In Jefferson Parish, which will point up one of the essential differences in the Camden Trust case.

(The documents were handed to the Court by Mr. Merrigan.)

Mr. Merrigan: In Camden Trust we had the Haddonfield National Bank opening a bank under the name of Delaware [42] National Bank; I believe that is the correct name. Here we have the Whitney National Bank of New Orleans, with its $500,000,000 in New Orleans, Louisiana, opening a branch under the name Whitney National Bank, and with little letters under it, In Jefferson Parish.

In other words, in Camden the Court of Appeals said, We will authorize the affiliate route where individual stockholders raise new capital and authorize the opening of the Bank because there is no confusion in names. But here they are using even the same name.

Now, this Comptroller of the Currency before the Court, Your Honor, is charged under Section 1842 of the Bank Holding Company Act with the obligation to tell the Federal Reserve Board whether he approves or disapproves of any particular holding company operation, and the Federal Reserve Board in a letter before this Court has advised that the duty to determine whether something is lawful or unlawful under the National Banking Act rests with the Comptroller in the first instance.

In this case, when the Whitney Holding Corporation went to the Federal Reserve Board and said, Now we have our holding corporation and under the Holding Company Act we want you to approve our acquisition of the stock in the Crescent City Bank—when the Whitney Holding Corporation went to the [43] Federal Reserve Board and asked that Board to approve their acquisition of the shares in the Crescent City National Bank and in the Whitney Na-

tional Bank In Jefferson Parish, the Comptroller of the Currency wrote a letter to the Board, didn't even mention Section 36, didn't mention any of the prohibitions which have gone on for years under the National Bank Act, but simply wrote this letter (indicating) to the Board of Governors of the Federal Reserve Board.

(The document was handed to the Court by Mr. Merrigan.)

The Court: What does it say?

Mr. Merrigan: It simply says that he approves it.

The Court: But is that binding on the Board?

Mr. Merrigan: No, under Section 1842 it isn't binding on the Board, but it authorizes the Board and the Board under such circumstances is authorized then not to hold a statutory hearing in Louisiana which would enable all the parties to come in before the Federal Reserve Board and examine and cross-examine witnesses.

The Court: Well, in other words, the action of the Comptroller is not final, is it? The final action will be the action of the Board.

Mr. Merrigan: No, Your Honor, no. The Comptroller issues the certificate which authorizes the opening of the [44] bank. The Federal Reserve Board action in this case was required for only one reason and one reason alone: the Whitney Holding Corporation couldn't acquire the shares in the Crescent City National Bank or in the Whitney National Bank In Jefferson Parish until it had gone to the Federal Reserve Board and gotten that Board's approval for the acquisition of the shares.

The Federal Reserve Board has no jurisdiction whatever over the authorization of the certification of the bank. And under the Bank Holding Company Act, Your Honor, any review of the Federal Reserve Board decision is limited to a review in the Fifth Circuit Court of Appeals, and you can't make the Comptroller a party to any review of the Federal Reserve Board decision, and we can't make the Federal Reserve Board a party to this proceeding.

The Court: Why not?

Mr. Merrigan: Because by Title 1218, 48 United States Code, the only review of the Federal Reserve Board's decision, under the Bank Holding Company Act, is limited to a review in the United States Circuit Court of Appeals either here in the District or in the Fifth Circuit.

The Court: Then isn't that your remedy?

Mr. Merrigan: No, Your Honor, that isn't my remedy because, as Exhibit C shows here, this is the Comptroller [45] of the Currency's proposed action. He proposes to issue a certificate authorizing the opening of the bank before that order becomes final. And if he does that, under a long line of decisions, the closest to home of which is the Roseville decision by Judge Youngdahl, no one but the Comptroller himself can question——

The Court: I know, but don't cite the decision of another District Court because that is not binding on me.

Mr. Merrigan: I understand that, Your Honor, and I didn't mean to infer that that was, but what I am trying to say is that by a long line of decisions, including the Supreme Court of the United States——

The Court: Anything that the Supreme Court holds and anything that the Court of Appeals holds is binding on me. I have a high regard for each of my colleagues, but that is not binding on me.

Mr. Merrigan: No, I realize that, Your Honor. Of course, Judge Youngdahl's decision was affirmed by the Court of Appeals.

The Court: Then cite the Court of Appeals and not the District Court.

Mr. Merrigan: What I am trying to say, Your Honor, I am really not trying to cite cases to you or against you or anything. I am trying just to say that the rule of law [46] is, and it's been established by a long line of cases, that once the Comptroller issues his certificate no one can contest it, no one can compel its revocation——

The Court: You don't mean that that is the law. You mean that you submit that it is the law.

I am not sure that it is the law. That is your contention, but don't be so dogmatic about it.

Mr. Merrigan: Well, what I mean to say to the Court is that no one can contest it but the Comptroller himself. That is the law as I understand it, Your Honor.

The Court: That is different. I am not so sure that you are right about that.

Mr. Merrigan: I want to say to the Court that there is one other possibility, a quo warranto proceeding by the Attorney General of the United States, and that was discussed in the Roseville decision, too, and was held to be such a speculative remedy——

The Court: That is speculative.

Mr. Merrigan: In other words, if the Comptroller goes ahead, Your Honor, and issues this certificate while the proceedings are pending in the Fifth Circuit Court of Appeals to review the findings of the Federal Reserve Board under the Holding Company Act there will be no remedy whatsoever to cause the bank, which will then be opened, assuming the Fifth [47] Circuit found it to be contrary to law, we could under no circumstances prevent the final result, which is the bank which is already in existence in Jefferson Parish.

The Court: Well, except that it would prevent the acquisition of the stock of the new bank by the holding company, would it not?

Mr. Merrigan: That has been done, as I understand it.

The Court: I say, if the Federal Reserve Board disapproves the transaction the holding company could no longer own the stock of the bank in Jefferson Parish, isn't that correct?

Mr. Merrigan: Well, assuming that would be true, I still say that that isn't the remedy for the plaintiffs, who are not so interested in who holds the stock but in the bank which is opened with the capital of the other bank.

The Court: I see. Well, you have taken quite some time. I hope you will come to a conclusion in short order.

Mr. Merrigan: I will, Your Honor.

The Court: Because I have a long calendar and you have taken almost an hour.

Mr. Merrigan: Well, I am terribly sorry, Your Honor.

The Court: That is all right. I want to give you [48] a full hearing because this is very important, but I hope you will come to a conclusion fairly soon.

Mr. Merrigan: Thank you, Your Honor. I just wanted to bring to Your Honor's attention, if we might, we have sworn affidavits before the Court and, as I say, most of the facts involved in this case are conceded. The amount of checking accounts of the plaintiff Bank of New Orleans, for example, in Jefferson Parish, Louisiana, amount to approximately——

The Court: What has that to do with this case?

Mr. Merrigan: Irreparable damage, Your Honor. $2,029,000 as of June 21, 1962.

The Court: You don't fear that all your depositors, all

your customers are going to withdraw their accounts and go over to the new bank, do you?

Mr. Merrigan: What we fear is that when this bank, with $500,000,000 of combined resources, opens its branch or branches, as we call it, in Jefferson and then throughout the State of Louisiana, as it would then be free to do under the ruling of this Court confirming the Comptroller's action in the case——

The Court: All that is before me is this one institution and not throughout the State of Louisiana.

Mr. Merrigan: This is the beachhead not only for [49] this bank, but I say to the Court that this, being a case of first impression, is the beachhead for all national banks similarly situated who have been wanting to branch for years. This is the beachhead. If this succeeds, Section 36 will no longer be a stumbling block; all they have to do is transfer their stock to a holding company and let the holding company open the branch.

So, this is a case of extreme national importance and it is a case which at the present time is a matter of tremendous concern to the President of the United States. This is a copy of his memorandum to the defendant Comptroller (indicating), among others, stating that this entire question of branching, branching through intermediaries, should be studied so that new legislative proposals could be made in 1963.

(The document was handed to the Court by Mr. Merrigan.)

The Court: I don't think the President of the United States ought to be quoted before this Court.

Mr. Merrigan: All right, Your Honor.

The Court: Is this part of the record?

Mr. Merrigan: It is part of the record, Your Honor. This was issued by the White House as——

The Court: Is this in the file in this case?

[50] Mr. Merrigan: Yes, it is, Your Honor.

The Court: I see. Very well. I have to decide this case on the law and I do not think policy ought to be considered by the Court. That is for the Executive Branch of the Government and for the Congress.

Mr. Merrigan: One last thing, Your Honor, I directed Your Honor's attention to Section 1846 of Title 12, which reserved to the states full control and jurisdiction over

bank holding companies and banks. By emergency action of the Louisiana Legislature, since the Comptroller of the Currency announced his purpose to allow this Whitney National Bank to open its facilities in Jefferson Parish, the House of Representatives of the Legislature of the State of Louisiana, by a vote of eighty to sixteen, the Senate of the State of Louisiana, by a vote of twenty-eight to seven, have passed the so-called Uniform State Holding Company Act——

The Court: This has nothing to do with the matter that I have to decide. This is all irrelevant, Mr. Merrigan.

Mr. Merrigan: Yes, Your Honor.

The Court: You know, I am not sitting as a jury or as a committee of Congress. I am confined to the law and judicial discretion.

Mr. Merrigan: I was leading up to the Braeburn decision, Your Honor.

[51] The Court: What about it?

Mr. Merrigan: That was a decision handed down by the Supreme Court of the State of Illinois involving a problem almost identical to the situation here involved. In that case the state legislature by emergency action, such as the one before this Court, had passed this Uniform Act. That case specifically held, Your Honor, that branch banking can result in one of two ways, either directly or through the device of a holding company. And they commented on this particular bill which has now been passed in Louisiana, awaiting the Governor's signature momentarily. They said

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The Court: You mean a court commented upon a bill that has not become a law as yet?

Mr. Merrigan: No, they commented on this Uniform Act, Your Honor. And in that case the thing that is important about that case is that the Supreme Court of Illinois specifically found that branch banking in contravention of Section 36 can result in one of two ways, either by direct——

The Court: This is a Federal question, not a question of state law.

Mr. Merrigan: It went to the Supreme Court and the Supreme Court dismissed the appeal for want of a substantial Federal question, and that was, of course, 1846 reserves to the states the right to control these matters. [52] We have before Your Honor an opinion of the At-

torney General of Louisiana holding that this would be in contravention of state law.

The Court: You know perfectly well that that is not authority. An opinion of the attorney general of a state deserves respect and will receive respect, but that is not an authority on which the Court can base a decision.

Mr. Merriga : No, Your Honor, I agree, and we don't mean that we are falling back on things that really are not usual. We say that our case can be decided under Section 36, Your Honor.

Thank you very much, and I want to apologize to the Court for the length of this, but it has been difficult to cover.

Thank you.

The Court: That is all right. The Court realizes this is a very important matter.

Mr. Seaman.

Mr. Seaman: If it please the Court, this is a matter of Federal law, Your Honor, and it is our position, very briefly, that this case is controlled by the recent decision in the Camden Trust case, Camden Trust Company vs. Gidney. Mr. Merrigan did refer to it in his argument. It was decided by the Court of Appeals——

[53] The Court: What is the citation? Have you got the book here?

Mr. Seaman: Yes, Your Honor, I do. Would you like me to hand you the book?

The Court: Yes, suppose you hand it up.

(The book was handed to the Court by Mr. Seaman.)

Mr. Seaman: Certiorari was——

The Court: You are referring to Camden Trust Company against Gidney, 301 F. 2d 521, is that the case you are referring to?

Mr. Seaman: Yes, Your Honor. Certiorari was denied May 21st in that case, Your Honor.

The Camden Trust Company case is very similar to the present case. That is the case that Mr. Merrigan discussed, where the management of an existing bank in New Jersey organized a new bank, a different bank at another location, and it was challenged on the ground that that was a violation of the Branch Banking Law.

The Court: I notice that Judge Bastian dissented in that case.

Mr. Seaman: Yes, Your Honor, he did.

The Court: And also that there was a petition for rehearing and that Chief Judge Miller and Circuit Judge [54] Bastian stated that they would grant the petition for rehearing en banc.

Mr. Seaman: It was a hotly contested case, Your Honor. We consider, however, that the facts are so similar to the present case that there is no escape from the conclusion that it is controlling here.

The only real difference, Your Honor, between the facts of the present case and the Camden Trust case is that here the stock of the two banks will be owned by a holding corporation, the Whitney Holding Corporation that was created by this series of transactions that Mr. Merrigan discussed. Whitney Holding Corporation, however, will be the stockholder of the banks, and in the Camden Trust case the stockholders of the two banks were the same individuals. I don't mean to imply that they owned a hundred per cent of the stock because I understand that is not the case, but this group did own over fifty per cent of the stock, and, thus, the two banks became affiliates.

Affiliate relationships in banking, Your Honor, are matters which have been long recognized

The Court: I am going to interrupt you with a question, Mr. Seaman. How did the Gidney case arise? Was that on a final judgment after a trial?

I see, this was a summary judgment.

[55] Mr. Seaman: Yes, summary judgment was granted, Your Honor. It was in much the same posture as the present case except——

The Court: No, what is before me is a motion for preliminary injunction. There is no motion for summary judgment before me.

Mr. Seaman: That is true, Your Honor, there is no motion for summary judgment.

The Court: I think there is a vast difference.

Mr. Seaman: Well, if I am not mistaken there was also a motion for preliminary injunction in the Camden Trust case, Your Honor, and that was denied at the time that the Government and the intervenor were granted summary judgment. There was an intervenor in that case also, the bank which was seeking the certificate of the Comptroller.

Mr. Merrigan: I don't want to interrupt, but there was a voluntary stay.

The Court: Just a moment. I have heard you at length. I want to give opposing counsel an opportunity to present their argument.

Mr. Merrigan: Thank you, Your Honor. I'm sorry.

Mr. Seaman: Yes, Your Honor, I believe there was a voluntary stay of the certificate also in that case. This is what Mr. Merrigan is referring to. I don't believe, however, [56] those differences are of any real significance to the present case. The decision was based on the proposition, Your Honor, as I understand it, that there was an independent bank about to be chartered in the case and the Comptroller had discretion to charter that independent bank; and that the nature of the independent bank, despite the fact that is was closely controlled, if that is the correct term, at least controlled a majority of the stock by the same people who controlled the other bank, the original bank, that that didn't make any difference and that it was not a branch of the original bank that the management controlled.

It not being a branch, it was, therefore, not in violation of Section 36(c), the Branch Banking Law, which is the main reliance that planfiffs place here; and, therefore, it being an independent bank, the Comptroller had discretion to issue his certificate, and it was issued in that case.

If it were not for this Branch Banking Law, Your Honor, it is our contention that the discretion in the Comptroller here would be unlimited. This is a matter of agency action, a matter which has been committed to agency action under the Administrative Procedure Act. There is no statutory form of review for the——

The Court: The Camden Trust Company case is a bit different, isn't it? It involved two independent banks [57] each having the same group of stockholders.

Mr. Seaman: Yes, Your Honor, that is the difference. That is true.

The Court: Here you have a holding corporation owning the stock of both banks. Isn't that a situation of a different type?

Mr. Seaman: Yes, Your Honor, it is different. We consider, however, that the difference is not significant.

The Court: Well, I don't know. Isn't it distinct in principle? Well, I will let you answer that question after our usual mid-morning recess.

We will take our usual mid-morning recess at this time.

(Brief recess.)

The Court: You may proceed, Mr. Seaman.

Mr. Seaman: Your Honor, your question was as to the difference betwen the Camden Trust case and the present case. Your Honor, as I view the Camden Trust case, it was decided basically on the ground that what was involved was an independent bank, a separate bank, which was applying for a certificate from the Comptroller; and because it was separate and for the list of differences that the Court gives there on the second or third page of the opinion, because of those differences it was not and could not be considered a branch, [58] that a branch has to be a part of the parent organization.

The Court: Yes, I understand all that, but there is a very vital difference. There was independent capital in each bank, even though the capital was furnished by the same people. But here you have a holding company that owns the stock of both banks.

Now, I notice that the word subterfuge was used in the Camden Trust Company case and the word evasion, which is not as disagreeable as subterfuge. I am not going to use either of those two terms, but isn't this a means of getting around a prohibition of this statute?

Mr. Seaman: Your Honor——

The Court: There is nothing reprehensible in that. I do not mean to suggest that anything reprehensible was done. But it is clear, is it not, that what the Whitney National Bank was doing was trying to establish what in essence, though not in form, was a branch bank, because it was another bank that it controlled.

Mr. Seaman: Your Honor, subject to what Mr. Monroe will probably wish to say on behalf of the Whitney, I would like to answer that this way: it is true, Your Honor, that the Whitney Jefferson operation is a means used for the Whitney Bank in New Orleans to pursue banking business in Jefferson Parish. I think there can be no real question about [59] that. But that is not the same thing, in my mind, Your Honor, as saying that it is a branch.

The Court: It is clear from the extracts of the testimony that has been read that the bank officials, being confronted with the statutory prohibition, perfectly honestly tried to figure out some other legal way to accomplish what the statute prohibited. Isn't that what this amounts to?

Mr. Seaman: Your Honor, I would say, yes; I believe that is correct.

The Court: I notice this action was filed almost a month ago. The Government hasn't moved, has it, for summary judgment or made a motion to dismiss?

Mr. Seaman: Your Honor, the reason we didn't do that was that we wanted an early hearing on the matter.

The Court: You could have as early a hearing on a motion for summary judgment as you can on a motion for preliminary injunction.

Mr. Seaman: Well, we presented our opposition, Your Honor, on the 20th of June. There was——

The Court: You could have filed a motion for summary judgment at the same time, Mr. Seaman.

Mr. Seaman: Yes, Your Honor.

The Court: What bothers me is this: I don't think I ought to decide this question of law on a motion for [60] preliminary injunction, which is addressed to the discretion of the Court, because this is a pretty important matter.

While if there was a motion for summary judgment, I could decide it. On the other hand, if there are some facts that are to be adduced, possibly the case would have to go to trial.

Mr. Seaman: Well, Your Honor, this is a motion for a preliminary injunction and the denial of such a motion is not a decision on the merits of the case.

The Court: Exactly. Neither is the granting of it. But here is what is bothering me, Mr. Seaman: if I deny the motion for preliminary injunction and the certificate is issued by the Comptroller of the Currency, the bank starts operating; and thereafter, if it should be held that this action was illegal, we would have a pretty difficult situation to unscramble, would we not?

Mr. Seaman: Your Honor, I think the answer to that question is that the remedy of the plaintiffs lies in this case, really, with the Fifth Circuit Court of Appeals now, and that if the Fifth Circuit Court of Appeals were to reverse the Federal Reserve Board, the holding company operation of which——

The Court: Is there anything pending now in the Fifth Circuit Court of Appeals?

[61] Mr. Seaman: Yes, Your Honor, they filed their appeal on June 30th.

The Court: Then isn't that all the more reason why the

Comptroller of the Currency should stop his hand and wait and see what happens?

Mr. Seaman: Well, Your Honor, the issuance of the certificate by the Comptroller of the Currency doesn't have anything directly to do with the proceeding before the Federal Reserve Board.

The Court: Yes, but the minute the Comptroller issues his certificate the bank can open its doors and do business, isn't that so?

Mr. Seaman: Yes, Your Honor; yes, that is true.

The Court: Now, suppose two or three months later there should be a final judgment in this case that the Comptroller of the Currency acted illegally. That would be a pretty sorry situation—well, it would be like trying to unscramble scrambled eggs, wouldn't it?

Mr. Seaman: Well, Your Honor, that would be true now because most of these eggs have already been scrambled. Most of the steps in this reorganization program that Whitney has undertaken have already been completed.

The Court: But is the bank operating?

Mr. Seaman: No, it is not operating.

[62] The Court: That is the point. The bank has not opened its doors yet.

Mr. Seaman: No, Your Honor, but it expended a considerable amount of money, as I understand it, getting ready to open its doors and it has gone pretty far.

The Court: I should think that the Comptroller of the Currency would want to wait until there is an adjudication in this action.

Mr. Seaman: Well, the Comptroller of the Currency, Your Honor, feels that the operation which is proposed here is lawful, that this bank has a right to open its doors.

The Court: Yes, but he may be mistaken, you know, because the question is a close one.

Mr. Seaman: Yes, Your Honor.

The Court: I am very strongly of the opinion that on a motion for preliminary injunction the Court ought not to express an opinion on the merits. The only question is whether the status quo should be continued.

Mr. Seaman: Well, it seems to me, Your Honor, that the answer to that question is whether or not the plaintiffs have a reasonable possibility of succeeding in the action.

The Court: Yes, and it does seem to me there is a substantial and reasonable doubt here as to the legality of this——

[63] Mr. Seaman: Your Honor, our position, of course, is that there is not a substantial doubt about it. For one thing, the Camden Trust decision also, Your Honor, because the bank holding company operation is not a new creature that they have just thought up. This is a regulated bank holding company, Your Honor.

The Court: But isn't this true, Mr. Seaman, that if this device is legal—and I am not going to express an opinion as to whether it is or is not, at this time—but if this device is legal, then you might as well repeal Section 36(c)?

Mr. Seaman: No, I would say, Your Honor, that that is not the case. 36(c) applies only to branches.

The Court: I understand. But it would become a dead letter because any bank that wanted to establish a branch would create a holding company as an intermediary.

Mr. Seaman: Yes, Your Honor.

The Court: Now, maybe that is legal.

Mr. Seaman: There would be certain differences, however, in the operation. One of the differences is that the independent bank under the holding company operation has its own capital, has limitations on the loans that it can make, it would have its own directors. None of these things are true of a branch, Your Honor. A branch has the lending powers [64] of the parent. A branch doesn't have directors, a branch doesn't have its own separate officers.

The Court: There are differences. The only question is whether the differences are sufficient.

Mr. Seamen: Your Honor, I did want to speak briefly about this holding company operation.

Your Honor, the Bank Holding Company Act of 1956 is the statute under which this holding company is proposing to operate. That statute, Your Honor, is administered by the Federal Reserve Board and not by the Comptroller of the Currency. And this holding company which has been set up is a Louisiana corporation. Your Honor, these questions have, for the most part, been gone into already before the Federal Reserve Board. That is the remedy, as we see it, that plaintiffs should be pursuing.

The Federal Reserve Board considers—has ruled that these transactions are legal. An appeal is pending from the Federal Reserve Board. And the Federal Reserve Board supervises bank holding companies, and this——

The Court: Isn't that all the more reason for maintain-

ing the status quo until the appeal before the Fifth Circuit is decided?

What is the status of that appeal?

Mr. Seaman: The appeal was just filed, Your Honor. [65] It was filed last Saturday.

The Court: How soon can it be heard, do you know?

Mr. Seaman: I really don't know, Your Honor, but I would suppose it would be some months. I don't know, though.

The Court: How long has this matter been pending before the Comptroller and before the Board?

Mr. Seaman: Well, I believe the Comptroller indicates in his affidavit that it's been pending since November, 1960.

Mr. Bloom: October, 1960.

Mr. Monroe: Since June, 1961.

The Court: Since when?

Mr. Seaman: June, 1961, Your Honor. Mr. Monroe, the attorney for the Whitney Bank, has been following the matter all that time. There were preliminary conversations with the Comptroller before the decision in October of 1961, which I guess was the first formal decision by the Comptroller in this matter.

Your Honor, I hope you will hear Mr. Malcolm Monroe at this time. He is——

The Court: Of course. I will hear everybody who is entitled to be heard. I am not cutting you off, Mr. Seaman. You may proceed.

Mr. Seaman: Mr. Monroe is the attorney for the [66] Whitney Bank and they do have the real interest in this case, in a sense. They are the ones who are——

The Court: I don't doubt the fact that the Whitney Bank has a real interest in the matter, of course.

Mr. Seaman: Yes, Your Honor. The Bank Holding Company Act of 1956, Your Honor, as I understand, had as one of its objectives the creation of this kind of a system. These bank holding companies operate all over the United States. There are a number of them. They hold banks some of them hold banks across state lines. They operate, many of them——

The Court: Let's not go into all these ramifications. The question before me is a narrow one: should I stay the status quo until the merits of this action can be determined. That is the only question for me to decide on this motion.

Mr. Seaman: Well, Your Honor, our position on that is

that plaintiffs do not have a case which deserves that kind of relief at this point. The case is controlled by the Camden Trust case. The device that is being used here is the holding company device, which is a recognized device, which is controlled by the Federal Reserve Board. The plaintiffs have a remedy, which they are pursuing, before the Federal Reserve Board. It is an adequate and complete remedy. The Court of Appeals, if it reverses——

[67] The Court: That is all the more reason for maintaining the status quo, I think.

Mr. Seaman: Well, Your Honor, if the Court lacks jurisdiction to proceed because they have a remedy before another body, it would seem to me that the other remedy should be pursued rather than that this action, of which we say the Court lacks jurisdiction——

The Court: There are two independent steps here. One is the action of the Federal Reserve Board; the other is the action of the Comptroller. And I think the plaintiffs, if they have any rights at all, can pursue either or both remedies.

Mr. Seaman: It's quite true, Your Honor, that they would be entitled to pursue any remedy that they wanted to. The thing that strikes me, though, is that this remedy, this suit against the Comptroller is one which has no justification, that they are seeking to enjoin the Comptroller on a basis which on its face has no merit; and it has no merit, Your Honor, because this is not a branch. And since it is not a branch, the certificate should issue. The Comptroller has discretion to issue that certificate. The fact that there is this other proceeding pending points up the fact that that is where their remedy lies.

Your Honor, I think if I may, I would like to have [68] Mr. Monroe speak to you at this time on behalf of the Whitney Bank.

The Court: Very well.

Mr. Monroe: May it please the Court, I am Malcolm Monroe of the New Orleans Bar, Louisiana Bar, and I represent the Whitney Bank.

The Court: Well, the technical name is Whitney National Bank of New Orleans, is that it?

Mr. Monroe: Whitney National Bank of Jefferson Parish, a completely new bank organized and ready to do business and seeking to do business, with completely independent stockholders.

The Court: They are the intervenor in this case?

Mr. Monroe: The intervenor in this case.

I am also counsel for the Whitney National Bank of New Orleans and the Whitney Holding Corporation, and I have handled the proceedings since the original application with the Comptroller, which was in June of 1961 and which was approved by the Comptroller on October 14th of last year—October 18th, subject to the approval of the Federal Reserve Board.

I handled the proceedings before the Federal Reserve Board, which were filed in July of last year and which there was an advertisement for a public hearing, at which the [69] plaintiffs did not appear. That hearing was held here in Washington, published in the Federal Register on January 17th. On January 17th statements were taken from all parties in interest before the full seven-man Board. We did not hear from the Board until May 3rd. The Board gave a ruling in favor of the Whitney Holding Corporation going forward.

The Comptroller then gave his final approval.

The Whitney Bank was reorganized into a holding company and a wholly owned subsidiary, and the Whitney Bank In Jefferson Parish was formed, its stock put up, subscribed, money put up, and it has been ready to do business, open its doors, except for these injunctive proceedings.

Now I'd like to get right to the point because I don't think it's come out all day, the express question that you have been asking Mr. Seaman.

Contemporaneous—we have proceeded with this program of banking which is done all over the country where there are like, similar statutes preventing branch banking. That is what holding company banking is. I would like to come back to that for a moment. But the point you are asking, why not maintain the status quo: this proceeding for injunctive relief, which was filed back on June 9th, was filed five days after a bill was introduced into the Legislature of Louisiana. We had been proceeding for two years under the law of Louisiana [70] as it was, studying this matter, with our final applications over a year ago. The Legislature was in session and on the last day of the legislative session this bill was introduced, and the following Saturday, Friday or Saturday, this injunctive proceeding was filed; a temporary restraining order or an equivalent, a

consent restraining order was obtained, and we have not been able to be heard until today. That was June 9th and this is almost thirty days later.

This is the first time we have been able to point out to the Court why it is important that the status quo not be maintained. That statute, as of last Wednesday, when we were before Judge Hart and we were resisting very strenuously that the matter should not be continued, he said to me, What can happen between last Wednesday and this Friday? I said, This statute is before the Legislature and I don't——

The Court: What statute is before the Legislature?

Mr. Monroe: The statute in Louisiana that will make it a crime, punishable by imprisonment, for a bank holding company subsidiary to open its doors for business, whether or not the Comptroller has issued a certificate. Even though he has issued the certificate it will be a crime, when that statute becomes law, to open our doors.

That statute since last Wednesday has been rushed through both Houses of the Legislature and as the last order [71] of business on July 4th that statute was passed by the Upper House, with this punitive clause in it, aimed at the Whitney National Bank situation, because it is the only corporate-holding corporation in Louisiana; only can it apply to this particular Whitney Bank In Jefferson Parish. It has passed both houses and both houses recessed. It cannot become law until some time on Monday. On Monday——

The Court: I am not going to rush the matter in order to prevent an action on the part of the Louisiana or any other state legislature. I think, then, with all due respect to the legislature, I ought to maintain the status quo.

Mr. Monroe: I would like to disagree with you.

The Court: This is an argument that is addressed to the Court's discretion that would be in favor of granting an injunction.

Mr. Monroe: Well, may I talk about that, because I certainly feel quite strongly the other way.

That means that this Court is being used, when I have not been able to be heard for a period of thirty days while the law of Louisiana changes and when there is no palpable reason to deny—when we have proceeded under the cases and under the legislative history of this Act as a perfectly legal transaction. We come right up to opening our [72]

doors, and the plaintiffs in this case are the people who introduced the legislation in court, our competitors, and are changing the law after we have spent a year on this proposition and after we have totally reorganized the Whitney Bank, of which this is a part and a brand new organization.

If we are frozen by this Court from doing what would be legal, why, under those circumstances we are faced with an entirely new criminal statute in Louisiana, when you consider it.

Now, I am in court, the Whitney Bank In Jefferson is in court, and the plaintiffs can under no circumstances be damaged because the cases they cite are not applicable where the Whitney Bank, the bank proposing to open, comes in and consents, and we do consent to return the certificate completely if the position of the plaintiff is maintained. It's obvious that we are in court, you have jurisdiction over us. We do not, though, want to be faced with a new criminal statute that was not on the books when we incorporated over a month ago and when our plans—a year ago our applications were filed. We think it is totally unfair when we for a year have been working with the Federal Government on a completely open and aboveboard matter.

I went to the attorneys for the Comptroller and the attorneys for the "Fed" with the President of the Whitney [73] Bank last June and we said the first thing we want to know is whether this is legal. The Whitney Bank is a very dignified old institution in the community.

The Court: There is no doubt about that. The Whitney Bank is well known in banking circles.

Mr. Monroe: We went to the attorneys and the first thing they said, it was the legal staff of both those Government agencies——

The Court: You know, you are referring to matters that are not in the record before me, Mr. Monroe. I really want to suggest that to you.

Mr. Monroe: Excuse me, Your Honor. I am saying it is in the record because Mr. Saxon's affidavit——

The Court: I mean the fact that the legislature may pass a statute on Monday which would make it a crime for you to do what the Comptroller might permit you to do. I don't think I ought to consider it. It is not in the record, is it?

Mr. Monroe: It is the meat of this case, Your Honor, and it is put in the record——

The Court: But if it is the meat of this case, then I ought to maintain the status quo because I don't think I ought to take time by the forelock in order to forestall an action of a state legislature.

[74] Mr. Monroe: It's not forestalling, it's allowing us to do something we were entitled to do a month ago and when we have not been able to get before this Court.

The Court: There is a big question whether you are entitled to do it. That is the whole question in this case. You are begging the question.

Mr. Monroe: Yes, but on the issue of preliminary injunction the question is whether the plaintiff would be damaged, and I am saying to you, Your Honor, in all due respect, that we are here and the cases he relies on that say he cannot take the certificate back are cases where they say that he has no standing in court. I am willing to waive that standing in court so that I can proceed under the law that we operated under. I have stated that and will file an affidavit to do that. He cannot possibly be damaged. He doesn't operate in this area. He is my competitor in New Orleans. And if he is not damaged, how can this Court completely deny me an opportunity to operate legally where I have worked for a year to do so? And the only reason I am not in business is because I haven't been able to get before this Court. The suit was filed on June 9th and today——

The Court: That is pretty quick. That is much faster than most administrative agencies operate.

Mr. Monroe: Well, I understand, but a restraining [75] order is a very harsh thing, Your Honor, and it really is harsh in the equities of the people before you. You are asking us not to do something that—you are telling us that we can't do something that is legal, and while you are holding it pending final decision the whole law is to be changed.

The Court: Mr. Monroe, please do not tell me that I would prevent you from doing something that is legal. If I would prevent you from doing it it is because I have a doubt as to whether it is legal.

Mr. Monroe: I agree with Your Honor, but there is a doubt as to the legality and we presumptively have gone along in a legal way when we have been through two agencies in a completely open hearing. There is not an argument that has been made today that wasn't made to

the "Fed" in open hearing. There is not an argument that will be made that won't be made to the Fifth Circuit. The Fifth Circuit has complete control over this situation, and the Fifth Circuit if it finds—the Fifth Circuit is completely authorized to make us divest ourself of the stock.

Now, let me understand this situation. This money that was made was taken from undivided profits and an unallocated reserve account and it was completely the stockholders' money. They could have put their hands in their pockets. Over ninety per cent of the stockholders voted to take their surplus [76] funds and carry this transaction out in open meeting called according to law. Every law was complied with all the way through.

Now, I would like to point out that, therefore, they could have done this in another way just as easily and this matter can be dissolved and it will be put in the hands of the stockholders and it will be just exactly the same thing as the Camden case.

Let me point out that this matter has been passed on in the Billings case, which is cited in our brief, in Montana. Let me point out that there holding companies——

The Court: What is the Billings case?

Mr. Monroe: First National Bank v. First Bank Stock Corporation, United States District Court Montana, 197 F. Supp. 417.

The Court: Did that go up to the Court of Appeals?

Mr. Monroe: It is on appeal at the moment. I am citing it because it sets forth very well the point I wish to make.

This precise point was made to Congress in 1955, it has been in 1953. When the Holding Company Act was presented to Congress there was presented with it a bill to put the provision in the Act that holding companies could not—subsidiaries of holding companies could not be formed in [77] violation of branch banking of the state in order to make—that would be the same parallel legislation as 18(c) for actual branch banking. That matter was discussed in my brief which is on file. That matter was discussed at great length and the Senate took the provision out of the bill. The report of the Senate committee on the bill that was adopted:

> "The committee decided against the inclusion in the Holding Company Act of a provision in the bill that would automatically apply state laws concerning branch

banking to bank holding company operations. The purposes of branch banking laws are not identical with the purpose of this bill to control bank holding companies. Moreover, branch banking is mostly conducted by the use of depositors' —"

The Court: Please do not quote at length.

Mr. Monroe: I'm sorry.

The Court: You see, I want to make it clear to you, gentlemen, that I am not going to pass upon or express any opinion as to the legality of this transaction on this motion. I do not think I should.

Mr. Monroe: All I am——

The Court: The only question I have to decide is whether I should maintain the status quo until the matter can [78] be decided.

Mr. Monroe: To that express point, Your Honor, I [illegible]ment that if the status quo is maintained I will be irreparably injured in that I will never be able to open unless that statute at some long future date is repealed. I can never be put back in the same position. I have proceeded in good faith for the last year. I will never be able to be put back in that position if this injunction is maintained.

On the other hand, the plaintiff can't really show any damage and he will not be damaged, if I open my bank, irreparably. There is another bank in Jefferson Parish right now that is in the same situation except for the holding company, it's owned by common stockholders, the National Bank of Commerce. Our biggest competitor in New Orleans is in Jefferson Parish right now and has been there five years under the name of the National Bank of Commerce in Jefferson Parish. It has five separate branches in Jefferson Parish, and that is the reason the Whitney Bank had to follow its competitors, because New Orleans is moving that way. And the National Bank of Commerce, a bank considerably bigger than these plaintiffs, has five banks there under the same name. The Comptroller understood that.

Now, if you maintained the injunction today and we set this up for a hearing on the merits—and you asked why [79] we did not urge, when we came into this case, that a motion immediately was set for summary judgment. It is because of the importance of the injunction to us in con-

nection with this steamroller legislation aimed directly at this particular institution. Today if we are held under this injunction we will never be able to be put back in the same position.

I repeat that I am in court. The permanent injunction can certainly take me out of Jefferson Parish.

The Court: Beg pardon?

Mr. Monroe: The permanent injunction can certainly stop me from operating, and I am perfectly willing——

The Court: The matter is not before me on an application for a permanent injunction.

Mr. Monroe: What I mean is that the application is before you.

The Court: What is before me is an application for a preliminary injunction, not a permanent injunction.

Mr. Monroe: That is true, Your Honor, but I would like to point out what the request is, just what is before you. May I read the prayer?

The Court: No; the only thing that is before me is a motion for a preliminary injunction.

Mr. Monroe: Yes, but injunction against what?

The Court: That is not a permanent injunction. [80] That would be an injunction until the case can be tried, if I grant it.

Mr. Monroe: I'm sorry, Your Honor. Before you is the request for a preliminary injunction and a permanent injunction, but the preliminary injunction restraining the Comptroller of the Currency from issuing to the Whitney National Bank or the Whitney National Bank In Jefferson Parish a certificate of authority authorizing the establishment of a new branch bank.

The Court: Yes, I know, but it is a preliminary injunction, not a permanent injunction.

Mr. Monroe: Yes, excuse me, it is a preliminary. But if that preliminary injunction issues, we are not establishing a new branch bank. All they have said is an injunction against establishing a new branch bank. If you grant it according to the letter of their prayer, they have not—I wonder if we are not entitled to go ahead and open in accordance with their prayer and I don't know whether we are entitled to have an injunction that is broader than their prayer, if you will read the prayer on the last page in the petition.

The Court: No, the motion for preliminary injunction is a motion for a preliminary injunction to restrain the defendant from issuing a certificate or certificates [81] authorizing the establishment and operation by the Whitney National Bank of New Orleans, the Whitney Holding Corporation of New Orleans, and or Whitney National Bank of Jefferson Parish, of a new branch bank or banks.

Mr. Monroe: That is correct, Your Honor. That is not what we are doing.

The Court: I see. Well, then, you would not be harmed by an injunction, would you?

Mr. Monroe: Well, that is perfectly true, but it doesn't meet the issues square on. Obviously we don't want to have a misinterpretation of what the position——

The Court: Gentlemen, I have given too much time to this matter. I think I have the issues perfectly clear in my mind.

Did you wish to add anything, Mr. Seaman?

Mr. Seaman: Yes, Your Honor, I think I have something that may be of some importance. I believe I have something that should be said here.

The Court: You can have two or three minutes. I thought you finished your argument.

Mr. Seaman: Very short. This is not an argument, Your Honor. I want to point out that the temporary restraining order expires today and the terms of it only go to today. If Your Honor is going to take the matter under advisement

[82] The Court: I am not.

Mr. Seaman: Excuse me, Your Honor.

The Court: I very rarely take matters under advisement. That is why I sometimes allow longer time for argument, because I like to decide questions at the end of the argument.

But I do want to ask you just one question, Mr. Merrigan. There is just one point that impresses me that Mr. Monroe made. How are you damaged by this?

Mr. Merrigan: There are three plaintiffs before this Court. Two of the plaintiffs before the Court are banks which, by state law, are strictly limited to operations wholly within the City of New Orleans.

The Court: Yes.

Mr. Merrigan: And, yet, very, very substantial parts of

their business, running into millions of dollars a year, emanate from Jefferson Parish, Louisiana.

The Court: I see. Very well. Now, then may I ask you this? While perhaps I should not concern myself with this because I am not going to impugn the motives of the actions of a legislature of a sovereign state, but were your clients instrumental in trying to get this legislation through and rush it through to make it a criminal offense to open a bank? It seems to me that is most extraordinary.

[83] Mr. Monroe: May I show you the newspaper——

Mr. Merrigan: Just a moment, Mr. Monroe. You made the charge; I would like to be heard.

The Act which has been before the Louisiana Legislature is the Uniform State Holding Company bill, which was passed in New York, New Jersey, Illinois, Indiana. It was introduced by——

The Court: I understand. Mr. Monroe states that that Act would make it a criminal offense to open the bank even if the Comptroller of the Currency grants the certificate. Is that so?

Mr. Monroe: May I answer that, Your Honor?

Mr. Merrigan: Your Honor, I don't think that the Act was meant to make it a criminal offense for them to open.

The Court: Is there a criminal provision in the legislation? You know, Mr. Merrigan, I am used to getting direct answers to my questions.

Mr. Merrigan: Yes, there is a criminal—it says, Your Honor, that upon any bank——

The Court: Let me see that criminal provision.

(The document was handed to the Court by Mr. Merrigan.)

Mr. Merrigan: It's at the bottom, Your Honor.

That legislation, Your Honor, was supported by the [84] State Banking Commissioner of Louisiana. That legislation was passed by the House of Representatives of Louisiana by a vote of eighty to sixteen and by its Senate by twenty-eight to seven. It was sponsored by the——

The Court: Were your clients instrumental in getting it through?

Mr. Merrigan: To the extent that they are members of the Louisiana State Bankers Association, which supported the bill.

The Court: I see.

Mr. Monroe: Your Honor, I would like to make a statement on that.

The Court: Yes, I will hear you.

Mr. Monroe: The President, Mr. Merrigan, of the plaintiff bank, Bank of New Orleans, advised us that he was going to introduce this bill. This bill was prepared by the attorneys sitting—it is the Uniform Act, but the Uniform Act does not have this amendment that I have read.

The Court: What is the amendment to the Uniform Act?

Mr. Monroe: The amendment is the one that makes it criminal to open.

The Court: Show me the provision.

Mr. Monroe: Here it is. It's part of the [85] plaintiffs' case, that Sub-section 5 down at the bottom.

(The document was handed to the Court by Mr. Monroe.)

Mr. Monroe: May I say this Uniform Act is not the normal Uniform Act you are familiar with, Your Honor. It's not adopted by anybody. It's just named that by a group of people.

Mr. Merrigan: I don't suppose Mr. Monroe would want to have this Court believe he hasn't had anything to do with those legislative proceedings, either.

The Court: I do not think I should engage in an unseemly race with a state legislature.

Mr. Monroe: We therefore don't believe that you should participate with it and keep us unable to go forward.

The Court: I am surprised at that provision.

I think, gentlemen, I have heard enough.

Mr. Monroe: I would like to point out to Your Honor that we have many hundreds of thousands of dollars invested in the preparation of this thing.

The Court: I understand all that. All banks have.

Mr. Monroe: And we will never have the opportunity to open this bank if the injunction is issued.

Opinion of the Court

The Court: Without expressing any opinion as to the legality of the proposed action the Court, nevertheless, [86] is of the opinion that a sufficiently debatable question is presented to make it desirable to maintain the status quo until the action can be determined on the merits.

Accordingly, the motion for a preliminary injunction is granted.

Counsel will please submit a proposed order and proposed findings of fact and conclusions of law. In preparing the findings of fact and conclusions of law counsel will bear in mind, please, that the Court will express no views on the legality of the proposed action which it enjoins. It is basing its present decision merely on the premise that there is a sufficiently debatable question.

Mr. Merrigan: Your Honor, would you continue the restraining order in effect until we can submit these papers?

The Court: I will continue the restraining order until Monday so as to give you an opportunity to prepare the papers.

Mr. Seaman: Your Honor, there is the question of a bond. We would like to have——

The Court: What about that? I suppose that can be determined when you submit your order.

Mr. Seaman: All right, Your Honor.

Mr. Monroe: Your Honor, I won't be here at the time, I don't believe. Would you hear any discussion of that? [87] The Court: Beg pardon?

Mr. Monroe: I am wondering, sir, if it wouldn't be well to discuss that today.

The Court: No, I will discuss it at the time you submit your order because I have got other matters waiting. You may come before me at 10 o'clock Monday morning with your proposed order.

Mr. Merrigan: Thank you, Your Honor.

(Thereupon, the hearing stood concluded.)

CERTIFICATE OF REPORTER

I, Gerald Nevitt Official Court Reporter, certify the foregoing 87 pages constitute the official transcript of proceedings in the stated action before Judge Holtzoff July 6, 1962.

In witness Whereof, I have affixed my signature this 13th day of July, 1962.

GERALD NEVITT.

Filed July 24, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

[Title omitted]

PLAINTIFFS' OPPOSITION TO DEFENDANT COMPTROLLER'S MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT IN THEIR FAVOR AGAINST DEFENDANT COMPTROLLER.

Come now the plaintiffs and intervening plaintiff herein, who oppose defendant Comptroller's motion for summary judgment herein, and who cross-move for summary judgment in their favor against defendant Comptroller on the following grounds:

1. There is no genuine issue as to any of the material facts upon which plaintiffs and intervening plaintiff rely in support of their cross motion, and

2. Plaintiffs are entitled to summary judgment as a matter of law.

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Of Counsel

Filed July 24, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

[Title omitted]

PLAINTIFFS' STATEMENT OF FACTS IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiffs, in support of their cross-motion for summary judgment herein and pursuant to Rule 9(h) of the Local Rules of this Court, hereby set forth a statement of the material facts in support of their cross-motion for summary judgment and contend there is no genuine issue as to these facts so stated:

1. The Whitney National Bank of New Orleans is the largest bank by far in the State of Louisiana. It is one of the largest financial institutions in the entire southern portion of the United States *(Defendant's Ex. 5, pg. 4)*.

2. For approximately 79 years, Whitney has operated banking offices and facilities wholly within the City of New Orleans and Parish of Orleans, Louisiana *(Complaint, Para. 7; Answer of Intervening Deft., Para. 7)*.

3. Through these operations, limited by law (both Federal and State) to the parish (i.e., county), in which Whitney has its main office (Orleans Parish), Whitney has grown to a position of dominance where it possesses——

approx. $500,000,000.—in resources
approx. 13,835,000.—in undivided profits
approx. 27,200,000.—in its surplus account
approx. 39%—of the total deposits in *all* banks in Orleans Parish
approx. 44%—of all deposits of individuals, partnerships and corporations in the Parish.

(Answer of Intervening Deft., Para. 7; Deft's Ex. 4, pg. 13)

4. In fact, Whitney controls and enjoys more deposit and loan business than the second and third largest banks in New Orleans combined *(Defendant's Ex. 5, pg. 18)*.

5. Furthermore, it enjoys at its banking facilities in New Orleans, deposits of individuals, partnerships and corporations emanating from the east bank of the Mississippi River in Jefferson Parish, Louisiana (i.e., beyond the limits of Orleans Parish), in an aggregate amount exceeding 30% of such deposits held by *all banks* having their head offices in the same area of said Jefferson Parish *(Defendant's Ex. 5, pg. 7)*.

6. Under *12 U.S.C. §36(c)* and the supporting law of Louisiana, a bank may not establish branches outside of the parish in which its head office is situated (a Louisiana "parish" is comparable to a "county" in other States). The boundaries of Orleans Parish are coterminous with the boundaries of the City of New Orleans, and consequently, banks situated in New Orleans (including national banks) may not establish branches beyond the City Limits. *(Defendant's Ex. 5, pg. 5)*.

7. For a long period of years, Whitney National Bank of New Orleans has been desirous of opening new branch bank facilities in Jefferson Parish, Louisiana, beyond the limits of New Orleans. It has carefully studied all of the means whereby it might avoid the prohibiting national and state statutory prohibitions against such branching, and finally decided to try a "holding company approach" *(Defendant's Ex. 4, pgs. 6-9; Plaintiffs' Ex. B, pg. 2)*.

8. The President of Whitney National Bank of New Orleans stated in testimony before the Federal Reserve Board *(Defendant's Ex. 4, pgs. 6-9)*:

> "The 'parish' in our state is equivalent to a county.
>
> "Under present laws in our state, the Whitney is not permitted to establish branches outside the Parish of Orleans.
>
> "There is a rapidly growing industrial area in adjoining Jefferson Parish upriver from Orleans. . . . The industrial development, in the form of large plants, more or less extends upriver on both sides to Baton Rouge, about 80 miles. . . . There is, therefore, good reason to look forward to continued industrial growth along the river with a concentration of small industries in Jefferson Parish. . . .
>
> "The management of the Whitney National Bank has been studying and weighing alternative methods of

entering Jefferson Parish . . . and to participate in the further growth of that area. . . .

"The officers of the Whitney National Bank determined in 1960 that the holding company was the proper solution, provided we could put the ownership of the present Whitney National Bank of New Orleans stock into such a company and, *by the use of Whitney assets, establish a bank in Jefferson Parish, which would likewise be fully owned by the holding company.*

"The Comptroller of the Currency has concurred in a program which has the effect of putting the ownership of the present Whitney National Bank stock into the Whitney Holding Corporation, through this Crescent City National Bank that was mentioned, *and to the establishment of the Whitney National Bank in Jefferson Parish with funds from the present Whitney National Bank.* . . .

"The Comptroller's action, however, is subject to the approval of this Board of the application of the Whitney Holding Corporation *to establish the wholly owned Jefferson Parish subsidiary.*" (Emphasis supplied.)

9. The President of the Whitney National Bank of New Orleans also testified as follows before the Federal Reserve Board *(Defendant's Ex. 4, pg. 23, 24)*:

"If branch banking were permitted in Jefferson Parish, I wouldn't be here because it would be much simpler to have it by way of a branch. . . . But that is not possible. We see no signs of it coming about by legislative action. . . . As I say . . . *we have been unwilling to go with an affiliate* which we couldn't hold onto necessarily.

"It doesn't become a part of our organization; it is just sort of hanging loosely. You have these conflicts of interest and it is awkward.

"*The thing that makes this (the holding company approach) interesting to us is the ability to approach the branch phase of it.* . . ." (Emphasis supplied.)

10. In November, 1960, the said President of Whitney National Bank of New Orleans visited the Deputy Comptroller of the Currency to discuss ways and means by which

the Whitney National Bank of New Orleans might be able to enter Jefferson Parish. *(Defendant Comptroller's Affidavit of June 20, 1962 herein, pg. 2)*

11. He returned to the Comptroller's office in Washington in June, 1961, bringing with him the attorney for the Whitney National Bank. *(Defendant Comptroller's Affidavit, pg. 2)*

12. At the last mentioned meeting, the following is stated to have taken place *(Defendant Comptroller's Affidavit, pgs. 2, 3)*:

> ". . . the Whitney National wished to explore with the Comptroller whatever . . . means were available for . . . expansion into this . . . area . . . The formation of an affiliate bank was discussed and the formation of a holding company also discussed. The bank management felt that a holding company which would own 100% of the stock of both the old bank and the new bank would be preferable to the formation of an affiliate of which the controlling stock would be held by the same persons who control Whitney New Orleans, but which, in view of the wide stock distribution of Whitney New Orleans, would invariably have a minority of stockholders who did not own stock in both banks. The existence of the minority stock interest in each bank, which did not hold corresponding shares in the other, was considered by the Whitney management to be an undesirable situation, because it could conceivably hamper the most efficient and effective day-to-day operation of the two banks. Since the same group would be managing both banks, it was thought that situations could arise in which it would be impossible for the interests of two different groups of minority stockholders to be fully protected. *For this reason, the Whitney management . . . elected to use a holding company for the purpose of establishing a . . . bank in Jefferson Parish.*" (Emphasis supplied.)

13. Having obtained from the Comptroller an informal *ex parte* approval of its desire to expand across parish lines into Jefferson Parish, the Whitney National Bank thereupon set into motion a series of intricate corporate maneu-

vers to accomplish indirectly that which was admittedly unlawful to accomplish indirectly, i.e., Whitney's expansion into Jefferson Parish. *(Defendant's Ex. 6; Plaintiff's Ex. B).*

14. Although complicated in execution, these corporate maneuvers were simply designed to draw funds from the Whitney National Bank of New Orleans, with which to establish a completely controlled banking facility in Jefferson Parish *(See Defendant's Ex. 6)*:

First: With $350,000. of its capital funds, Whitney National Bank created Whitney Holding Corporation, a corporation organized under the laws of the State of Louisiana.

Second: Solely with the $350,000. in funds contributed by Whitney National Bank, the Whitney Holding Corporation organized Crescent City National Bank (Crescent) to which defendant Comptroller agreed to issue a national bank charter, knowing full well that Crescent would exist in name only and would never itself engage in a banking business.

Third: Whitney and Crescent, which latter entity never actually operated for an instant as a national bank (and Whitney Holding Corporation), entered into a consolidation or merger agreement, merging Whitney National Bank into Crescent. The name of the merged bank was then immediately changed back to Whitney National Bank of New Orleans.

Fourth: Whitney National Bank of New Orleans shareholders surrendered their stock for cancelation and accepted, in exchange, Whitney Holding Corporation shares, dissenting stockholders, if any, being eliminated by the purchase of their shares under provisions of the National Banking Act.

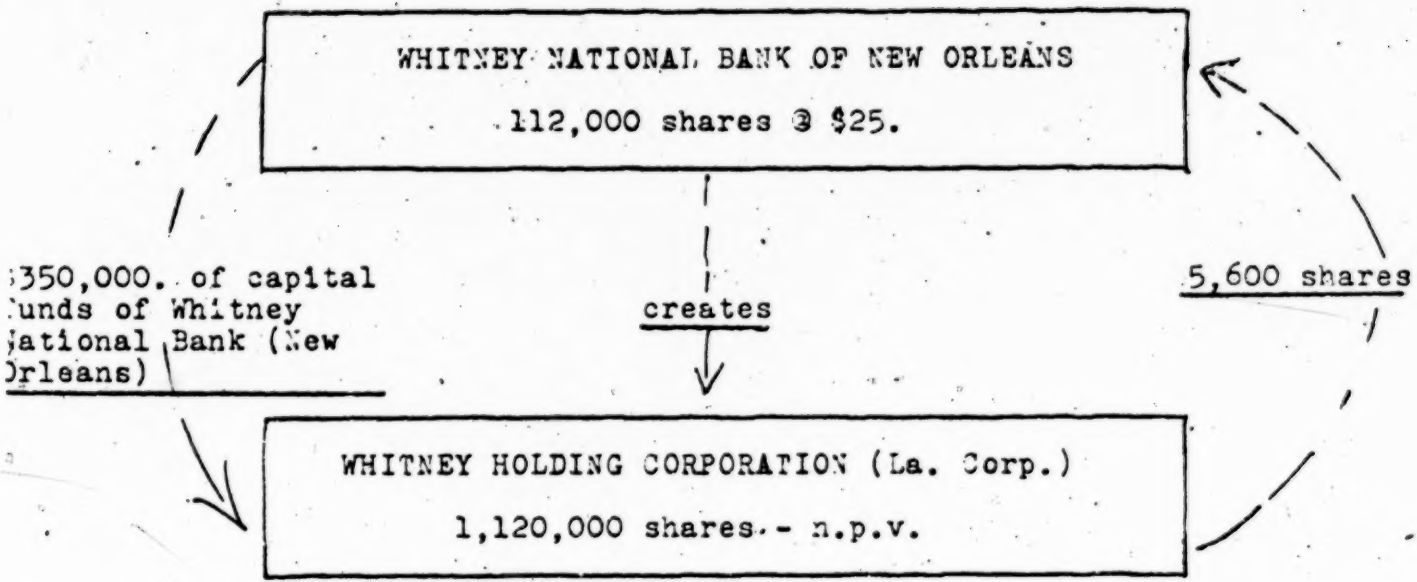
Thus, Whitney Holding Corporation owned 100% of the stock of Whitney National Bank of New Orleans, and the stockholders of Whitney National Bank of New Orleans owned 100% of the stock of Whitney Holding Corporation.

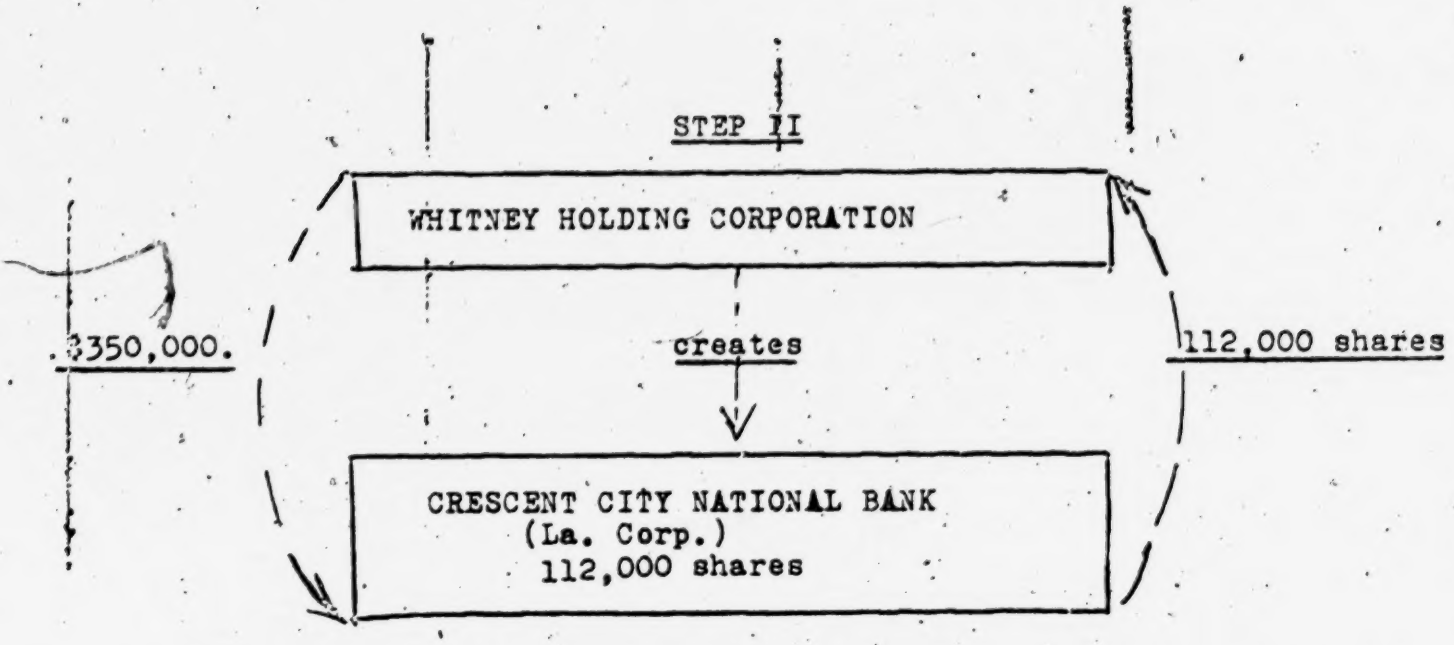
Fifth: Whitney National Bank of New Orleans then provided $650,000. of its funds to Whitney Holding

Corporation "with which Whitney Holding Corporation will cause to be created the Whitney National Bank in Jefferson Parish, receiving all of its (the Jefferson Bank's) stock therefor" *(See Defendant's Ex. 6, pg. 2, Item 6).*

15. In order to assist the Court to obtain more quickly a detailed analysis of these corporate maneuvers, plaintiffs have caused to be prepared, from *Defendant's Ex. 6,* a graphic presentation thereof, which we incorporate in this Statement of Material Facts at this point.

STEP I

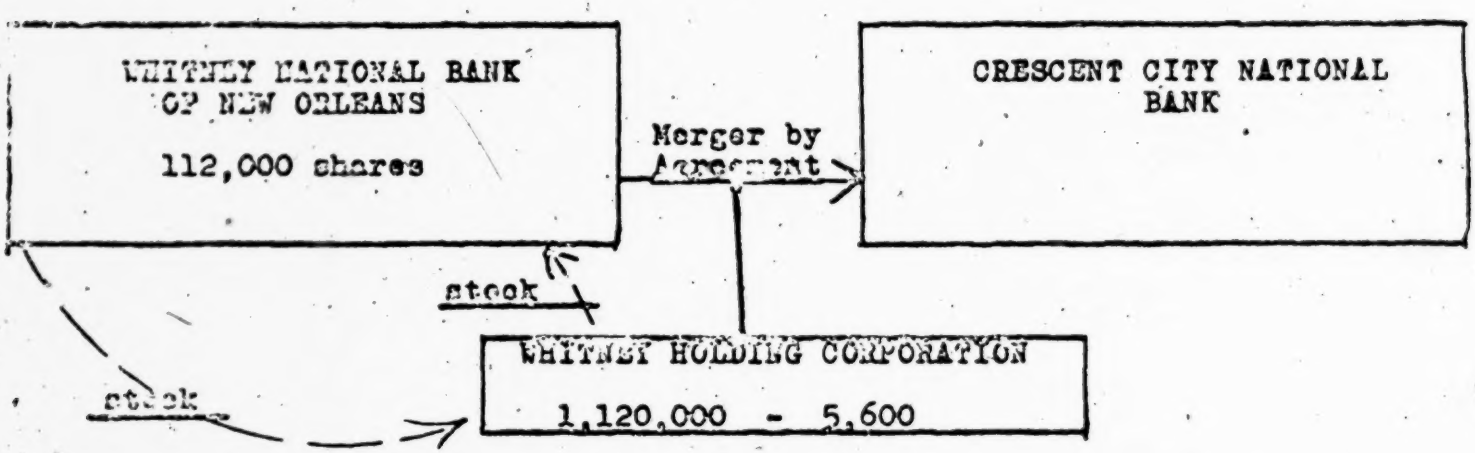

WHITNEY NATIONAL BANK OF NEW ORLEANS
112,000 shares @ $25.
$350,000. of capital funds of Whitney National Bank (New Orleans)
creates
5,600 shares
WHITNEY HOLDING CORPORATION (La. Corp.)
1,120,000 shares - n.p.v.



The Crescent City National Bank never operated as a bank; never conducted any banking business; never owned any banking assets or any other assets prior to the merger with Whitney National Bank of New Orleans described in Step 3. It was organized as a "phantom", solely to enable Whitney National Bank of New Orleans to merge with it; eliminate any dissenting stockholders of Whitney National Bank of New Orleans as part of the merger procedure. Then, the "phantom" disappears and there remains again only one bank, to wit, the old Whitney Bank of New Orleans, operating and trading under its old name.

STEP III

(Merger Agreement)

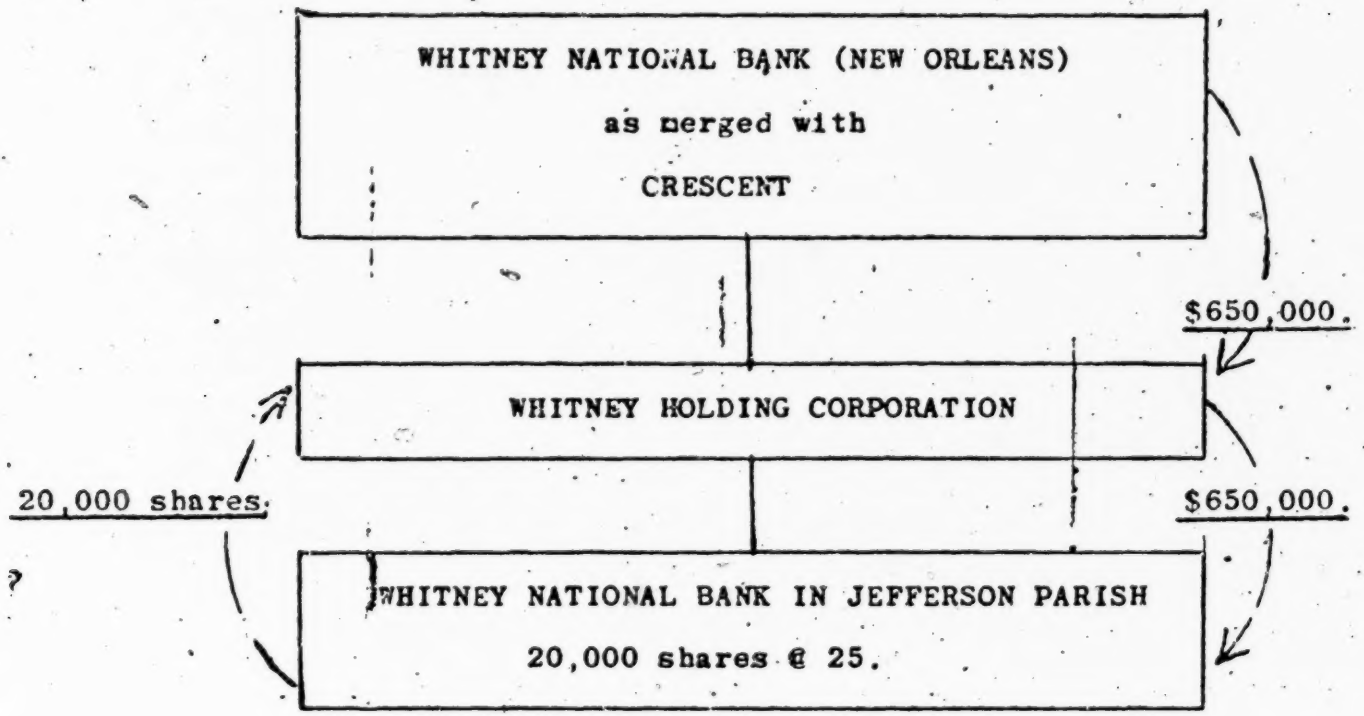


Whitney National Bank (New Orleans) merges with Crescent City National Bank. All assets of Whitney National Bank (New Orleans) become Crescent's. Name of Crescent City changed back to Whitney National Bank (New Orleans).

Stock of Whitney National Bank (New Orleans) 112,000 shares exchanged for 1,114,400 shares of Whitney Holding Corporation, (i.e. 1,120,000 less 5,600 already held by Whitney National Bank (New Orleans)). Thus, stockholders of Whitney National Bank (New Orleans) become 100% owners of Whitney Holding Corporation.

Under National Banking Act, any dissenting stockholder of Whitney National Bank (New Orleans) is bought out if he elects to sell instead of going along with merger.

STEP IV



This Step, as described by President of Whitney National Bank (New Orleans), (Plaintiffs' Ex. A):

> "The Crescent City National Bank (to be named Whitney National Bank of New Orleans) will provide $650,000. Whitney Holding Corporation with which Whitney Holding Corporation will cause to be created the Whitney National Bank in Jefferson Parish."

16. When the time arrived for Whitney National Bank of New Orleans to obtain support from its stockholders for these corporate proposals, the President of said bank advised his shareholders in writing as follows *(Defendant's Ex. 6, pg. 2)*:

> "The basic purpose of the program is to allow the Whitney organization in New Orleans to commence a Holding Company operation controlling a bank in East Jefferson Parish to protect Whitney's competitive position in that area . . ."

17. On October 28, 1961, on a letterhead of the Whitney National Bank of New Orleans, the President of Whitney further wrote to his shareholders as follows *(Plaintiffs' Ex. B)*:

> "It is important to bear in mind that under the plan all authorized shares of the Whitney Holding Corporation will be distributed to you, the stockholders of the Whitney National Bank, in exchange for your presently held stock. *You will then own the same proportionate interest as you now have in the Whitney National Bank in all of the assets of the holding corporation, which then obviously includes all of the assets of the present Whitney National Bank . . .*
>
> "We are firmly convinced, after careful consideration of the alternatives, *that your common ownership of all of the Whitney National Bank of New Orleans stock and all of the stock of a Whitney National Bank in Jefferson Parish by a holding company to be owned by you is the soundest method of pooling all of the deposits of our customers and of our capital funds for their use . . .* From the depositors' point of view, those in the smaller bank *will be assured of the same management which directs the larger one* without possibility of interruption. . . .
>
> "By reason of the common ownership of the two banks in a holding company there can arise no conflict of interest between them as there can between affiliated banks. There will be no minority stockholder to be affected.
>
> "From the customer point of view there will be no conflict of interest arising out of the manner in which the customer sees fit to divide his business between

the commonly owned banks in the two parishes. He will have the full benefits of a relationship with the large bank and its officers.

"Because of the permanent relationship between the large and the smaller bank, the smaller one can operate safely with a smaller capitalization. . . .

"Finally, this holding company group broadens banking possibilities for the future. . . . It will give metropolitan New Orleans the soundest form of banking unit *which can accumulate and pool banking resources in this community where they can be used to the greatest advantage in the further development of the entire area.*" (Emphasis supplied.)

18. After its creation by Whitney National Bank of New Orleans, Whitney Holding Corporation made application to the Federal Reserve Board of Governors for approval of its acquisition of shares in the aforementioned Crescent City corporation and Whitney National Bank in Jefferson Parish referred to above. In accordance with the requirements of *12 U.S.C. §1842(b)*, the Board thereupon notified the Comptroller of the Currency of the application and sought his views *(Answer of Intervening Defendant herein, Para. 16, 17)*.

19. Having previously given to the Whitney representatives as aforesaid, his informal approval of the plan *ex parte* as hereinabove set forth, defendant Comptroller, in three short paragraphs of a letter to the Board, gave his full approval to the proposals of the Whitney organization; and in his said letter, he failed even to mention or comment upon the legality or illegality of the proposals under *12 U.S.C. §36(c)*, *12 U.S.C. §1846*, or *Louisiana Revised Statutes 6:51*, enacted in pursuance of said *12 U.S.C. §36(c)* *(Plaintiffs' Ex. H)*.

20. The Federal Reserve Board, on the other hand, took a formal, written position that the question of whether or not such proposals as Whitney's are lawful under *12 U.S.C. §36(c)* or any other provision of the National Bank Act are not for the consideration of the Board, but are matters to be considered by the defendant Comptroller *(Plaintiffs' Ex. I)*. In this respect, the Board ruled that these questions *(Plaintiffs' Ex. I, pg. 2)*—

"relate largely to an alleged violation of provisions of the National Bank Act, which is administered by the Comptroller of the Currency, an official of the United States Treasury Department."

21. Thus, when it rendered a decision on May 3, 1962 approving the application of Whitney Holding Corporation to proceed to acquire the shares in Crescent and Whitney Jefferson, the Federal Reserve Board, without referring to *12 U.S.C. §36(c), 12 U.S.C. 1846* or the Louisiana laws prohibiting branching beyond parish lines, candidly stated *(Defendant's Ex. 5, pg. 6)*:

"The stated purpose of the proposed holding company system is to enable an organization centered about Whitney New Orleans to provide banking services not only through its existing 12 offices within the City of New Orleans *but also through offices in the East Bank of Jefferson Parish.* The holding company system will be under the direction of the present executive management of Whitney New Orleans; *in fact, for present purposes the holding company itself is simply the means by which Whitney banking offices may be established and operated in East Bank. Consequently, the character of the management and the prospects of the applicant and its two proposed subsidiary banks may be evaluated largely on the basis of the financial history and condition, character of management, and prospects of Whitney New Orleans.*

"The financial history of Whitney New Orleans has been satisfactory. The condition of that bank is sound and its management is regarded as satisfactory. Accordingly, it is believed that the management of Applicant and Whitney Jefferson will be satisfactory and the prospects of the holding company, which depend principally upon the prospects of Whitney New Orleans, are favorable."

22. In a dissenting opinion from the aforementioned ruling of the Federal Reserve Board, it was stated *(Defendant's Ex. 5, pg. 18, 21, 22)*:

"Whitney National Bank of New Orleans is the largest banking institution of the City of New Orleans and

the State of Louisiana. . . . The proposal before the Board of Governors would place control of this bank in Whitney Holding Corporation *and thereby would overcome the effect of the branch banking laws of Louisiana, which prevent Whitney from establishing any offices outside of Orleans Parish (the City of New Orleans). In other words, by this means, the Whitney banking organization would escape the legal limitations that now permit it to have offices only within the City of New Orleans*. . . .

"The *proposal* before the Board . . . would also . . . provide a vehicle for enhancing the existing high degree of banking concentration in the area and *would permit a centralization of banking power of major proportions in individual hands, to a degree that, to my knowledge, is without parallel in the American banking system*. . . ." (Emphasis supplied.)

23. The aforementioned ruling by the Federal Reserve Board is subject to judicial review by the Fifth Circuit Court of Appeals *(12 U.S.C. §1848)*. Upon such review, the Court has jurisdiction

> "to affirm, set aside, or modify the order of the Board and to require the Board to take such action with regard to the matter under review as the court deems proper."

A petition to review the Board's ruling upon the Whitney application is presently pending in the Fifth Circuit *(Bank of New Orleans and Trust Company v. Board of Governors of the Federal Reserve System, No. 19788, C.C.A. 5)*.

24. Defendant Comptroller's predecessor in office originally took the position that he would not issue any approval of or certificate for the establishment and operation of the Whitney National Bank in Jefferson Parish until final approval of all prior steps in the Whitney plan had been obtained "as required by the Bank Holding Company Act" *(Affidavit of Defendant Saxon, pg. 4, Para. 6)*.

25. However, before such approval could become final under that Act *(12 U.S.C. §1848)*, or under the Regulations of the Federal Reserve Board itself, Defendant Comptroller issued on May 18, 1962, his approval of the consum-

mation of the last steps required to enable the Whitney organization to establish and open Whitney National Bank in Jefferson Parish *(Plaintiffs' Ex. C)*.

26. Defendant Comptroller thereupon announced that, unless this Court issued an injunction restraining him from issuing a certificate authorizing the establishment and commencement of business by Whitney National Bank in Jefferson Parish, he considered it his immediate "duty . . . to issue the Certificate of Authority to Whitney Jefferson . . .". *(Affidavit of Defendant Saxon, pg. 7, Para. 12)*.

27. The Attorney General of Louisiana, on June 13, 1962, issued a written opinion to the State Bank Commissioner of Louisiana, advising *(Plaintiffs' Ex. E)*:

> "It is the opinion of this office, therefore, that a bank holding company may not circumvent the branch bank laws of our State by the acquisition of a controlling interest in a subsidiary which is located in a parish other than the domicile of the parent company."

28. Meanwhile, Whitney National Bank caused to be printed checks and letterheads for the proposed Whitney National Bank in Jefferson Parish, which show the name "Whitney National Bank" in very large, bold letters; and the words "in Jefferson Parish" in such tiny caps that they do not seem even to constitute part of the name of the proposed Jefferson bank office. Specimens of such checks, made available by defendants herein, are inserted here for the Court's consideration.

29. The Complaint herein was filed on June 9, 1962. Defendant Comptroller, upon being advised of the filing or impending filing, voluntarily agreed to withhold issuance of his Certificate of Authority to Whitney Jefferson until the Motion for Preliminary Injunction could be determined.

30. On June 27, 1962, when defendant Comptroller refused voluntarily to withhold issuance of the Certificate any longer, Judge Hart, after hearing, granted a Temporary Restraining Order directing the Comptroller to withhold his certificate until July 6, 1962. (See Transcript of Proceedings before Judge Hart filed herewith.)

31. On July 6, 1962, after long oral argument, Judge Holtzoff granted plaintiffs' motion for a preliminary injunction. (See Transcript of Proceedings of July 6, 1962 before Judge Holtzoff filed herewith.)

32. On July 10, 1962, Judge Holtzoff signed the Preliminary Injunction herein.

33. The Federal Bank Holding Company Act (*12 U.S.C. §1846*) provides:

> "*Reservation of rights to States*
> "The enactment by the Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof."

34. On July 10, 1962, the Governor of Louisiana signed into law Act No. 275 of the 1962 Regular Session of the Louisiana Legislature (Certified Copy of said Act is filed herewith as *Plaintiffs' Ex. L*).

Said Act, designated "Emergency Legislation" by the Governor, went into effect when signed on July 10, 1962 and it "prohibits the formation of new bank holding companies", and provides for the "control of the future expansion of existing bank holding companies and of their subsidiaries".

Section 3 of said Act provides:

> "It shall be unlawful . . . (5) for any bank holding company or subsidiary thereof to open for business any bank not now opened for business, whether or not, a charter, permit, license or certificate to open for business has already been issued."

35. Article 3, Section 27 of the Louisiana Constitution provides that this Act, certified by the Governor of Louisiana as "emergency legislation", "shall become effective immediately upon approval by the Governor", which was on July 10, 1962 (*Plaintiffs' Ex. M*).

36. During the proceedings before Judge Holtzoff on July 6, 1962, the attorney for Whitney National Bank in Jefferson Parish, the intervening defendant herein, made the following statements on the record with reference to this Louisiana Statute (and the Court's statements, of course, are self-explanatory), at *pages 70, 71* of the transcript:

> "*The Court:* What statute is before the Legislature?
> "*Mr. Monroe:* The statute in Louisiana that will

make it a crime, punishable by imprisonment, for a bank holding company subsidiary to open its doors for business, whether or not the Comptroller has issued a certificate. Even though he has issued the certificate it will be a crime, when the statute becomes law, to open our doors.

"That statute since last Wednesday has been rushed through both Houses of the Legislature and as the last order of business on July 4th that statute was passed by the Upper House, with this punitive clause in it, aimed at the Whitney National Bank situation, because it is the only corporate holding corporation in Louisiana; only can it apply to this particular Whitney Bank in Jefferson Parish. It has passed both houses and both houses recessed. It cannot become law until some time on Monday. . . .

"*The Court:* I am not going to rush the matter in order to prevent an action on the part of the Louisiana or any other state legislature. I think, then, with all due respect to the legislature, I ought to maintain the status quo. . . . This is an argument that is addressed to the Court's discretion that would be in favor of granting an injunction. . . ."

And at *page 73:*

"*Mr. Monroe:* It (the Louisiana statute) is the meat of this case, Your Honor. . . .

"*The Court:* But if it is the meat of this case, then I ought to maintain the status quo because I don't think I ought to take time by the forelock in order to forestall an action of a state legislature. . . ."

And, finally, at *page 85:*

"*The Court:* I do not think I should engage in an unseemly race with a state legislature. . . .

"*Mr. Monroe:* We therefore don't believe that you should participate with it and keep us unable to go forward. . . . I would like to point out to Your Honor that we have many hundreds of thousands of dollars invested in the preparation of this thing. . . .

"*And we will never have the opportunity to open this bank if the injunction is issued.*" (Emphasis supplied.)

37. Plaintiff, Bank of New Orleans and Trust Company, is a banking corporation chartered by the State Bank Commissioner of Louisiana to conduct the business of banking solely and exclusively at and through a main office and bank branches, restricted by *Louisiana R.S. 6:54* to the Parish of Orleans, and is prohibited by Louisiana law from establishing any branch or branches in Jefferson Parish, Louisiana (Affidavit of Livaudais, Ex. Vice Pres. of said plaintiff).

However, as of June 21, 1962, said plaintiff enjoyed at its offices so restricted to Orleans Parish, checking accounts of depositors who reside in or whose businesses are located in Jefferson Parish amounting to approximately *$2,029,000.*, and these represented deposits by *2,812* such individuals and businesses. Said deposits were equal to *12.3%* of the total checking accounts deposits enjoyed by said plaintiff on that date *(Livaudais Affidavit*, pg. 2).

Furthermore, on June 2, 1962, said plaintiff's "total amount of commercial loans to persons residing in or businesses located in Jefferson Parish exceeding $10,000. amounted to approximately *$3,410,000.*" or "approximately *15%* of the total amount of commercial loans exceeding *$10,000.* of all customers of the Bank on that date". The foregoing figures are limited to commercial loans exceeding $10,000., and in addition thereto, the said plaintiff has outstanding a large volume of commercial loans to persons and businesses in Jefferson Parish in amounts less than $10,000. *(Livaudais Affidavit*, pg. 2).

38. Plaintiff, Bank of Louisiana in New Orleans, is a banking corporation chartered by the State Bank Commissioner of Louisiana to conduct the business of banking solely and exclusively at and through a main office and bank branches restricted by *Louisiana R.S. 6:54* to the Parish of Orleans and is prohibited by Louisiana law from establishing any branch or branches in Jefferson Parish, Louisiana. *(Affidavit of Clyde C. Wheeler, Asst. Vice-President of said plaintiff.)*

However, as of July 19, 1962, said plaintiff enjoyed at its offices so restricted to Orleans Parish, accounts of "demand and time depositors who reside in or whose businesses are located in Jefferson Parish amounting to approximately *$502,000.*, represented by deposits by 621 individuals and businesses, (which) accounted for approxi-

mately 8.6% of the total demand and time deposits of customers on that date". "In addition to checking accounts, the Bank serves a very large number of individuals and businesses who reside in or are located in Jefferson Parish on installment loans." (*Wheeler Affidavit*, pg. 2)

39. Plaintiff, Guaranty Bank & Trust Company, is a banking corporation chartered by the State Bank Commissioner of Louisiana to conduct the business of banking solely and exclusively at and through a main office and bank branches limited by *Louisiana R.S. 6:54* to the Parish of Lafayette, Louisiana, and prohibited by Louisiana law from establishing any branch or branches in Jefferson Parish, Louisiana (*Affidavit of R. J. Castille, President of said Plaintiff*).

Said plaintiff "has customers, depositors and borrowers who reside or have . . . businesses situated in Jefferson Parish, Louisiana, and these customers borrow money and maintain accounts with" the said plaintiff. In addition, said plaintiff "makes commercial loans to some of its customers who have places of business in Jefferson Parish, Louisiana, and it follows necessarily that the Guaranty Bank & Trust Company of Lafayette, Louisiana would be damaged if the Whitney National Bank of New Orleans, the largest bank in the State, were permitted to open branch banking facilities, through one device or another, in Jefferson Parish, Louisiana" (*Affidavit of Castille*, pg. 2).

Respectfully submitted,

EDWARD L. MERRIGAN,
Attorney for Plaintiffs

July 24, 1962

PLAINTIFFS' EXHIBIT L

WADE O. MARTIN, JR.

I, the undersigned Secretary of State, of the State of Louisiana

do hereby certify that the annexed and following five (5) pages constitute a true and faithful photographic copy of House Bill No. 1221, which has been designated as Act No. 275 of the 1962 Regular Session of the Louisiana Legislature, as shown by comparison with the original document on file in the archives of this office.

In testimony whereof, I have hereunto set my hand and caused the Seal of my Office to be affixed at the City of Baton Rouge on,

this, the 12th day of July, A. D. 1962

WADE O. MARTIN, JR.

I, the undersigned *Secretary of State*, of the State of Louisiana

do hereby certify that the annexed and following five (5) pages constitute a true and faithful photographic copy of House Bill No. 1221, which has been designated as Act No. 275 of the 1962 Regular Session of the Louisiana Legislature, as shown by comparison with the original document on file in the archives of this office.

In testimony whereof, I have hereunto set my hand and caused the Seal of my Office to be affixed at the City of Baton Rouge on,

this, the 12th day of July, A. D. 1962

Wade O. Martin, Jr.
Secretary of State

2295

CERTIFICATE 183

Act No. 275

HOUSE BILL NO. 1221

BY: MR. ANGELLE
(BY REQUEST)

AN ACT

To define the bank holding company, to prohibit the formation of new bank holding companies, and to control the future expansion of existing bank holding companies and of their subsidiaries.

ORIGINATED

IN THE

House of Representatives

ORIGINATED

IN THE

House of Representatives

W Pleas Cole
Clerk of the House of Representatives

Certified by the Governor as Emergency Legislation.

July 4, 1962
date

Wade O. Martin, Jr.
Secretary of State

Received by the Governor
July 10, 1962 at 2:25 PM
D. Andrews

Received by Secretary of State

this 11th day of July, 1962

Wade O. Martin, Jr.
Secretary of State

HOUSE BILL No. 1221 By: Mr. Angelle
(By Request)

AN ACT

To define the bank holding company, to prohibit the formation of new bank holding companies, and to control the future expansion of existing bank holding companies and of their subsidiaries.

Be it enacted by the Legislature of Louisiana:

Section 1. Declaration of Policy.

It is declared to be the policy of this State to protect and to foster the growth of the independent unit bank, and institution whose ownership and origins are grounded in the local community and whose activities are bound up with local economic and social organizations; to prevent the undesirable concentration of control in the banking field to the detriment of the public interest; to insure effective competition among all banking institutions; and, to accomplish these objectives by prohibiting the formation of new banking holding companies and the acquisition of control by whatever means of additional banking institutions by existing bank holding companies and by their subsidiaries.

Section 2. Definitions.

(a) "Bank holding company" means any company, foreign or domestic, including a bank, (1) which directly or indirectly owns, controls, or holds with power to vote, 25 per centum or more of the voting shares of any bank, or (2) which controls in any manner the election of a majority of the directors of any bank, or (3) for the benefit of whose shareholders or members 25 per centum or more of the voting shares of any bank or a bank holding company is held by trustees; and for the purposes of this Act, any successor to any such company shall be deemed to be a bank holding company from the date as of which such predecessor company became a bank holding company. Notwithstanding the foregoing, (A) no company shall be a bank holding company by virtue of its ownership or control of shares acquired by it in connection with its underwriting of securities and which are held only for such period of time as will permit the sale thereof upon a reasonable basis, and (B) no company formed for the sole purpose of participating in a proxy solicitation shall be a bank holding company by virtue of its control of voting rights of shares

acquired in the course of such solicitation (C) nor shall this act apply to shares acquired by a bank holding company which is a bank, or by any banking subsidiary of a bank holding company, in satisfaction of a debt previously contracted in good faith, but such bank holding company or such subsidiaries shall dispose of such shares within a period of two years from the date on which they were acquired or from the date of enactment of this Act, whichever is later (D) nor shall this Act apply to shares which are held or acquired by a bank holding company which is a bank or by any banking subsidiary of a bank holding company, in good faith in a fiduciary capacity; except where such shares are held for the benefit of the shareholders of such bank holding company or any of its subsidiaries, or to shares which are of the kinds and amounts eligible for investment by National banking associations under the provisions of section 5136 of the Revised Statutes, or to shares lawfully acquired and owned prior to the date of enactment of this Act by a bank which is a bank holding company, or by any of its wholly owned subsidiaries.

(e) "Company" means any corporation, business trust, partnership, association, or similar organization doing business in this State, but shall not include any corporation the majority of the shares of which are owned by the United States or by any State,

(f) "Bank" means any commercial bank, savings bank, trust company or similar organization doing business in this State.

(g) "Subsidiary," with respect to a specified bank holding company, means (1) any company 25 per centum or more of whose voting shares (excluding shares owned by the United States or by any company wholly owned by the United States) is owned or controlled by such bank holding company; or (2) any company the election of a majority of whose directors is controlled in any manner by such bank holding company; or (3) any company 25 per centum or more of whose voting shares are held by trustees for the benefit of the shareholders or members of such bank holding company.

(h) The term "successor" shall include any company which acquires directly or indirectly from a bank holding company shares of any bank, when and if the relationship

between such company and the bank holding company is such that the transaction effects no substantial change in the control of the bank or beneficial ownership of such shares of such bank.

Section 3. Prohibitions upon Acquisition of Bank Shares or Assets.

It shall be unlawful (1) for any action to be taken which results in a company or a bank becoming a bank holding company as defined in this Act; (2) for any bank holding company or subsidiary thereof to acquire direct or indirect ownership or control of any voting shares of any bank if, after such acquisition, such company or subsidiary will directly or indirectly own or control more than 25 per centum of the voting shares of such bank; (3) for any bank holding company or subsidiary thereof to acquire all or substantially all of the assets of a bank; or (4) for any bank holding company or subsidiary thereof to merge or consolidate with any other bank holding company or any subsidiary thereof; (5) for any bank holding company or subsidiary thereof to open for business any bank not now opened for business, whether or not, a charter, permit, license or certificate to open for business has already been issued. Notwithstanding the foregoing, this prohibition shall not apply to additional shares acquired by a bank holding company in a bank in which such bank holding company owned or controlled a majority of the voting shares prior to such acquisition.

Section 4. Penalties.

Any bank, bank holding company, company, or any subsidiary of any of them which willfully violates any provision of this Act, or any regulation or order issued by the State Bank Commissioner pursuant thereto, shall upon conviction be fined not less than $500 nor more than $1,000 for each day during which the violation continues. Any individual who willfully participates in a violation of any provision of this Act shall upon conviction be fined not less than $1,000 nor more than $5,000 or imprisoned not more than one year, or both.

Section 5. Administration.

The State Bank Commissioner shall administer and carry out the provisions of this Act and may issue such regula-

tions and orders as may be necessary to discharge this duty and to prevent evasions of the Act.

Section 6. Savings Clause.

Nothing herein contained shall be interpreted or construed as approving any act, action, or conduct which is or has been or may be in violation of any existing law, nor shall anything herein contained constitute a defense to any action, suit or proceeding pending or hereafter instituted on account of any prohibited antitrust or monopolistic act, action, or conduct.

Section 7. Severability.

If any provision of this Act or the application of such provision to any person or circumstance, shall be held invalid, the remainder of the Act, and the application of such provision to persons or circumstances other than those to which it is held invalid, shall not be affected thereby.

Section 8. Repeal.

All laws or parts of laws in conflict herewith are hereby repealed.

[Copy Illegible],
Speaker of the House of Representatives.

[Copy Illegible],
Lieutenant Governor and President of the Senate.

JIMMIE H. DAVIS,
Governor of the State of Louisiana.

Approved: July 10, 1962 at 4:15 P.M.

PLAINTIFFS' EXHIBIT M

LEGISLATIVE DEPARTMENT

Art. 3 § 26

Notes of Decisions

1. Promulgation, judicial inquiry as to

The fact whether or not the law has been duly promulgated may be within the province of the judicial, but whether or not it went regularly through all the stages necessary for its passage as a law, up to the promulgation, is not a subject of judicial inquiry. Whited v. Lewis, 1873, 25 La. Ann. 568.

§ 27. Effective date of laws; publication

Section 27. All laws enacted shall go into effect at twelve o'clock, noon, on the twentieth day after the Legislature shall have adjourned. This provision shall not apply to the general appropriation Act or the Act appropriating money for the expenses of the Legislature, or to any Act the necessity for the immediate passage of which shall have been certified to the Legislature by the Governor, or the acting Governor, while the Legislature is in session, and any such Act so certified shall become effective immediately upon approval by the Governor. All Acts shall be published in the official journal without delay after passage.

The Legislature shall provide for the publication of said Acts in book form and shall fix the time limit for their delivery to the Secretary of State. In the publication of Acts of the Legislature, the signatures of the Governor and presiding officers of the two houses shall be omitted, but the date of approval of the Acts, or of their passage over the Governor's veto, or of Acts becoming law without the Governor's signature, shall be published at the bottom of each Act. (As amended Acts 1936, No. 70, adopted Nov. 3, 1936.)

Historical Note

1936 Amendment:

The 1936 amendment added the provisions relating to acts certified to the legislature by the governor or acting governor as necessary for immediate passage.

Earlier Constitutions:

1913, arts. 42, 165.
1898, arts. 42, 165.
1879, arts. 40, 154.
1868, art. 109.
1864, art. 108.
1852, arts. 100, 129.
1845, arts. 103, 132.
1812, art. 6, § 15.

Cross References

Adjournment of House and Senate, see art. 3, § 20.
Bills and resolutions,

Indorsement by secretary of state, see LSA-R.S. 43:24.
Register of resolutions, see LSA-R.S. 43:24.
Signing of bills by Governor, see art. 5, § 15.

Certification of documents, see LSA-R.S. 49:204.

Delivery of bills to Governor, see art. 3, § 26.

Deposit of laws with secretary of state, see art. 5, § 15.

Filed July 24, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF LOUISIANA

Civil Action No. 1857-62

[Title omitted]

AFFIDAVIT IN SUPPORT OF PLAINTIFF, BANK OF LOUISIANA IN NEW ORLEANS

STATE OF LOUISIANA,
Parish of Orleans:

Before me, the undersigned authority, personally came and appeared:

CLYDE C. WHEELER a person of the full age of majority and a resident of the Parish of Orleans, who after being by me, Notary, first duly sworn, did depose and say:

That he is the Assistant Vice-President of the plaintiff, Bank of Louisiana in New Orleans, and he submits this affidavit in support of the pending motion for preliminary injunction in the above entitled cause;

That he understands that it has been asserted in this action that party-plaintiff, Bank of Louisiana in New Orleans, would suffer no damage to its business, its properties or its profits if the defendant, Comptroller of the Currency, issued a certificate to the Whitney National Bank of New Orleans to establish banking facilities in Jefferson Parish, Louisiana. Affiant states that such assertions are untrue and incorrect for the following reasons:

Plaintiff, Bank of Louisiana in New Orleans, maintains its principal office in the Parish of Orleans, State of Louisiana, and is restricted by State law from establishing banking facilities in Jefferson Parish or any other Parish in the State of Louisiana. Notwithstanding the fact that this plaintiff's banking facilities are limited to the Parish of Orleans, a very large number of the plaintiff's customers, depositors and borrowers reside in and are principally located in Jefferson Parish, Louisiana. Affiant has re-

viewed the ledgers of the Bank of Louisiana in New Orleans and:

1. As of July 19, 1962 the total amount of demand and time depositors who reside in or whose businesses are located in Jefferson Parish amounted to approximately $502,000.00, and represented deposits by 621 individuals and businesses and accounted for approximately 8.6% of the total demand and time deposits of customers on that date. In addition to checking accounts the Bank serves a very large number of individuals and businesses who reside in or are located in Jefferson Parish on installment loans.

Accordingly, should the Comptroller of the Currency authorize the Whitney National Bank of New Orleans, the largest bank in the State, with combined resources of almost one-half billion dollars, to open branch banking facilities through one device or another in Jefferson Parish, plaintiff would necessarily suffer severe loss of loans, deposits and other business and would sustain damage to its business and profits. Additionally, if the Comptroller is permitted to issue the certificate of authority, as he proposes to do unless enjoined, this plaintiff would have no adequate remedy at law and would be unable to defend itself against the diversion to and appropriation by said Whitney National Bank of a substantial part of the banking business and services now enjoyed by the Bank of Louisiana in New Orleans.

CLYDE C. WHEELER.

Sworn to and subscribed before me this 20th day of July, 1962.

_____

Notary Public.

Filed July 24, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

[Title omitted]

AFFIDAVIT IN SUPPORT OF PLAINTIFF, GUARANTY BANK & TRUST COMPANY, LAFAYETTE, LOUISIANA

STATE OF LOUISIANA,
Parish of Lafayette, ss:

Before me, the undersigned authority, personally came and appeared:

R. J. CASTILLE a person of the full age of majority and a resident of the Parish of Lafayette, Louisiana, who, after being by me, Notary, first duly sworn, did depose and say:

That he is President of the plaintiff, Guaranty Bank & Trust Company of Lafayette, Louisiana, and he submits this affidavit in support of the pending motion for preliminary injunction in the above-entitled cause.

That he understands that it has been asserted in this action that the Guaranty Bank & Trust Company of Lafayette, Louisiana, would suffer no damage to its business, its properties or its profits if the defendant, Comptroller of Currency, issued a certificate to the Whitney National Bank of New Orleans to establish banking facilities in Jefferson Parish, Louisiana.

Plaintiff, Guaranty Bank & Trust Company of Lafayette, Louisiana, maintains its principal offices and banking branches entirely within the Parish of Lafayette, Louisiana and is restricted by State law from establishing banking facilities in Jefferson Parish, Louisiana or any other parishes in the State of Louisiana.

Plaintiff, Guaranty Bank & Trust Company of Lafayette, Louisiana, has customers, depositors and borrowers who reside or have branches of their businesses situated in Jefferson Parish, Louisiana, and these customers borrow money and maintain accounts with the Guaranty Bank &

Trust Company of Lafayette, Louisiana. Plaintiff, Guaranty Bank & Trust Company of Lafayette, Louisiana, makes commercial loans to some of its customers who have places of business in Jefferson Parish, Louisiana, and it follows necessarily that the Guaranty Bank & Trust Company of Lafayette, Louisiana, would be damaged if the Whitney National Bank of New Orleans, the largest bank in the State, were permitted to open branch banking facilities, through one device or another, in Jefferson Parish, Louisiana.

Additionally, if the Comptroller of the Currency is permitted to issue the certificate of authority, this plaintiff would have no adequate remedy at law.

R. J. CASTILLE.

Sworn to and subscribed before me this 19th day of July, 1962.

JAMES W. BEAN,
Notary Public.

Filed August 10, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

[Title omitted]

OPPOSITION OF DEFENDANT COMPTROLLER OF THE CURRENCY TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT, AND FURTHER CROSS-MOTION OF SAID DEFENDANT TO DISMISS

Comes now the defendant Comptroller of the Currency, by his undersigned counsel, and opposes plaintiffs' cross-motion for summary judgment herein on the ground that plaintiffs are not entitled to judgment as a matter of law. Said defendant's pending motion for summary judgment should be granted and plaintiffs' cross-motion should be denied.

The defendant Comptroller of the Currency further cross-moves for an order dismissing the complaint and this action on the grounds (1) that the complaint fails to state a

claim upon which relief can be granted, (2) that the Court lacks jurisdiction over the subject matter, (3) that plaintiffs have failed to join (and cannot join) indispensable parties, (4) that plaintiffs have failed to exhaust their administrative remedies, and (5) that plaintiffs lack standing to sue. This further cross-motion to dismiss is supplemental to the pending motion for summary judgment and is intended as an alternative request for relief.

/s/ JOSEPH D. GUILFOYLE,
Acting Assistant Attorney General.

/s/ DONALD B. MACGUINEAS,
/s/ DAVID V. SEAMAN,
Attorneys, Department of Justice
Attorneys for Defendant Comptroller of the Currency.

Of Counsel:

DAVID C. ACHESON,
United States Attorney.

Filed August 10, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

[Title omitted]

STATEMENT OF DEFENDANT COMPTROLLER OF THE CURRENCY IN RESPONSE TO THE STATEMENT OF FACTS SUPPORTING PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

As required by Local Civil 9(h), plaintiffs have filed a statement of the material facts as to which they contend there is no genuine issue. We agree that there are no disputed issues of fact in this case. We therefore do not contest plaintiffs' statement of material facts except as to the wording of the following paragraphs:

7. We deny the truth of the matters set forth in paragraph 7, except when stated as follows: "For a long period

of years, the management of Whitney New Orleans has desired to expand banking operations in Jefferson Parish. It has carefully studied all of the methods by which such operations might be legally conducted and has decided to utilize the device of a bank holding company."

13. We deny the truth of the matters set forth in paragraph 13, except when stated as follows: "Having obtained from the Comptroller informal approval of its desire to expand banking operations in Jefferson Parish, the Whitney management thereupon set into motion steps in a corporate reorganization, designed to accomplish such expanded operations through an independent bank controlled by a regulated bank holding company."

24. We deny the truth of the matters set forth in paragraph 24, except when stated as follows: "By letters dated October 3, 1961, former Comptroller Gidney gave preliminary approval to the formation of Crescent City National Bank, and the formation of Whitney Jefferson subject to the grant of the approval of the Federal Reserve Board to the formation of the holding company for the purpose of acquiring the new Whitney New Orleans and Whitney Jefferson, as required by the Bank Holding Company Act of 1956."

25. We deny the truth of the matters set forth in paragraph 25, except when stated as follows: "On May 3, 1962, the Board of Governors of the Federal Reserve Board rendered its decision and order approving the application of Whitney Holding Corporation for permission to become a bank holding company by acquiring the stock of the Crescent City and Whitney Jefferson. On May 18, 1962, the Comptroller issued his approval to the consolidation of Whitney New Orleans with Crescent City under the title of Whitney National Bank of New Orleans. The final steps for the completion of the formation of Whitney Holding Corporation and the Crescent City National Bank and the consolidation were all accomplished on May 24, 1962, and the new bank in New Orleans commenced business on May 25, 1962."

26. We deny the truth of the matters set forth in paragraph 26, except when stated as follows: "Following completion of the organization of Whitney Jefferson by the Whitney Holding Corporation, the Comptroller considered it to be his duty to issue a Certificate of Authority to Whitney Jefferson, since the organizers had faithfully

executed all steps and fulfilled all requirements necessary for the organization of a new bank."

/s/ JOSEPH D. GUILFOYLE,
Acting Assistant Attorney General.

/s/ DONALD B. MACGUINEAS,
/s/ DAVID V. SEAMAN,
Attorneys, Department of Justice
Attorneys for Defendant Comptroller of the Currency.

Of Counsel:

DAVID C. ACHESON,
United States Attorney.

Filed August 10, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

[Title omitted]

SUPPLEMENTARY AFFIDAVIT OF JAMES J. SAXON, COMPTROLLER OF THE CURRENCY

James J. Saxon, being first duly sworn, deposes and says:

1. The purpose of this affidavit is to supplement my earlier affidavit dated June 20, 1962, heretofore filed in this matter.

2. I have reviewed the contents of my affidavit of June 20, 1962, and I now specifically reaffirm each and every statement contained therein. Subsequent to the preparation thereof, certain developments have occurred, to which I respectfully invite the attention of the Court.

3. On June 25, 1962, by letter addressed to Edward L. Merrigan, Esquire, the Board of Governors of the Federal Reserve System denied the Petition for Reconsideration, Revocation, and Rehearing filed on behalf of the plaintiffs in this action of the Board's Order of May 3, 1962, permitting Whitney Holding Company to become a bank holding company by acquiring substantially all of the voting stock

of a bank in New Orleans, Louisiana, and a bank in Jefferson Parish, Louisiana. This letter has been filed as Plaintiffs' Exhibit 1 to the affidavit of Lawrence A. Merrigan, dated June 26, 1962.

4. I am advised that review of the Board's Order of May 3, 1962, is presently being sought before the United States Court of Appeals for the Fifth Circuit.

5. On July 10, 1962, the Governor of the State of Louisiana approved Act No. 275, entitled "An Act to define the bank holding company, to prohibit the formation of new bank holding companies, and to control the future expansion of existing bank holding companies and of their subsidiaries."

6. Upon consideration of these subsequent developments, and after careful examination of the Louisiana statute, I have concluded that there has occurred no reason to alter the Comptroller's prior determination that a certificate of authority should be issued to Whitney National Bank in Jefferson Parish, pursuant to 12 U. S. C. § 27.

7. Accordingly, if the preliminary injunction entered herein is vacated, and if Whitney National Bank in Jefferson Parish so requests, inasmuch as upon a careful examination of the facts within my knowledge it appears that such association is lawfully entitled to commence the business of banking, it is my present intention to issue such certificate. For the information of the Court, there is appended hereto and designated as Defendant's Exhibit 7 a specimen of such certificate.

/s/JAMES J. SAXON.

Subscribed and sworn to before me, this 9th day of August 1962.

HELEN CRIST CRAVER,
Notary Public

My Commission Expires Sept. 30, 1966.

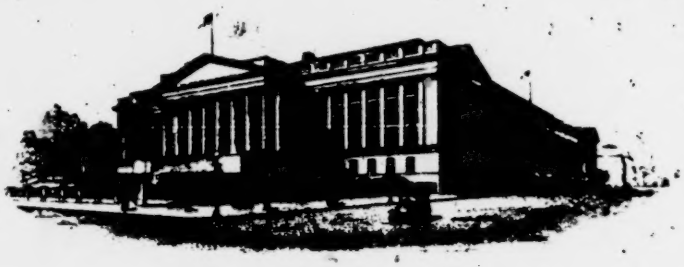
Filed August 10, 1962

DEFENDANT SAXON EXHIBIT 7

311

Comptroller of the Currency

TREASURY DEPARTMENT



OF THE UNITED STATES

Washington, D. C.,

Whereas, satisfactory evidence has been presented to the Comptroller of the Currency that

located in , State of , has complied with all provisions of the statutes of the United States required to be complied with before being authorized to commence the business of banking as a National Banking Association;

SAMPLE

Now, therefore, I hereby certify that the above-named association is authorized to commence the business of banking as a National Banking Association.

In testimony whereof, witness my signature and seal of office this day of 19

Charter No.

Comptroller of the Currency

Filed August 13, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

[Title omitted]

MOTION FOR LEAVE TO AMEND ANSWER

Intervening Defendant, Whitney National Bank in Jefferson Parish, moves the Court for leave to file and serve a supplemental answer, a copy of which is annexed hereto. The ground of this motion is that the matters set forth in the supplemental answer arose after Intervening Defendant had served its original answer.

Respectfully submitted,

W. GRAHAM CLAYTOR, JR.,
701 Union Trust Building,
Washington 5, D. C.

MALCOLM L. MONROE,
1424 Whitney Building,
New Orleans 12, Louisiana.

August 13, 1962.

Filed September 10, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

[Title omitted]

SUPPLEMENTAL ANSWER OF INTERVENING DEFENDANT WHITNEY NATIONAL BANK IN JEFFERSON PARISH

Intervening Defendant, Whitney National Bank in Jefferson Parish, for its supplemental answer herein, alleges:

I

Since the date of filing Intervening Defendant's original answer herein, the Louisiana Legislature has passed Act No. 275 of 1962, a certified copy of which is Plaintiffs' Exhibit L. Act No. 275 was first introduced into the Louisiana House of Representatives as House Bill 1221 on June 3, 1962 just six (6) days prior to the filing of this suit by the Bank of New Orleans and Trust Company, et al. House Bill 1221 was certified by the Governor as emergency legislation on July 4, 1962. Under Louisiana law, House Bill 1221 became immediately effective as law when it was signed by the Governor as Act No. 275 on July 10, 1962, at 4:45 p.m.

II

As first introduced in the House of Representatives, House Bill 1221 would not have prevented Whitney National Bank in Jefferson Parish from opening for business as the stock of the said bank was already owned by Whitney Holding Company. Subsequent to the granting of a temporary restraining order by this Court on June 27, 1962, which prevented the Comptroller of Currency from issuing a certificate to commence business to Whitney National Bank in Jefferson Parish, House Bill 1221 was amended by the insertion therein of the present Sub-Section 5 of Section 3 of Act 275, which applies only to Whitney

National Bank in Jefferson Parish, and which specifically provides as follows:

> "Section 3. Prohibitions upon Acquisition of Bank Shares or assets.
>
> It shall be unlawful . . . (5) for any bank holding company or subsidiary thereof *to open for business* any bank not now opened for business, *whether or not, a charter, permit, license or certificate to open for business has already been issued.* (Emphasis added.)

III

The temporary restraining order issued herein on June 27, 1962, and the preliminary injunction granted by this Court on July 6, 1962, dated July 10, 1962, both of which enjoined the Comptroller of Currency from issuing a certificate to commence business, were the sole reason that Whitney National Bank in Jefferson Parish did not open its doors for business several weeks prior to July 10, 1962, the effective date of Act No. 275.

IV

Because Louisiana Act 275 became effective on July 10, 1962, denial of the Plaintiffs' petition for permanent injunction and declaratory relief will not return Intervening Defendant to the *status quo* that existed on June 27, 1962, the date on which the temporary restraining order was issued. Plaintiffs now rely on Act 275 as an alternative ground for summary judgment in their favor. Consequently, the question of the applicability and legality of Act 275 has been injected into this case by the Plaintiffs, and this question must be passed upon if Intervening Defendant is to be restored to the former position it would have been in had the temporary restraining order not been issued.

V

Intervening Defendant specially avers that Act 275 furnishes no basis for granting the Plaintiffs' request for declaratory relief or for an injunction, either temporary or permanent, against either Defendant Comptroller of the Currency or Intervening Defendant, because Act 275 does

not apply to the Comptroller of the Currency or to a national bank such as Whitney National Bank in Jefferson Parish.

VI

Intervening Defendant further avers that Act 275, if applicable, violates the statutes and Constitution of the United States in the following respects:

(a) Act 275 is an attempt by the State of Louisiana to prevent the opening of a national bank that is properly chartered and organized in compliance with federal law, and as such is in direct conflict with the provisions of the National Banking Act, 12 U.S.C. 26, which provides that the Comptroller of Currency has authority to decide when a national bank may commence business. It is therefore invalid under the supremacy clause of the United States Constitution (Article VI, Section 2).

(b) Act 275 violates the Fourteenth Amendment to the United States Constitution in two respects:

(1) Sub-section 5 of section 3 of Act 275, if applied to Whitney National Bank in Jefferson Parish, constitutes an arbitrary, capricious and unreasonable classification that denies equal protection of law to the Intervening Defendant.

(2) Whitney National Bank in Jefferson Parish had completed all steps required by law and was ready to commence business several weeks prior to the effective date of Act 275. Intervening Defendant, therefore, had a vested property right which Act 275 denies Intervening Defendant without due process of law.

(c) Act 275 violates Article I, Section 10 of the United States Constitution in that it impairs the obligation of a contract between the federal government and the Intervening Defendant.

Wherefore, reiterating and fully reserving all its rights under the prayer of its original answer, Intervening Defendant further prays that this Court enter a judgment herein declaring that Louisiana Act 275 of 1962 does not apply to either the Defendant Comptroller of the Intervening Defendant, Whitney National Bank in Jefferson Par-

ish. In the alternative, Intervening Defendant further prays for a judgment declaring that the said Act 275 is unconstitutional and void. Intervening Defendant further prays for all legal, equitable and declaratory relief.

W. Graham Claytor, Jr.,
701 Union Trust Building,
Washington 5, D. C.

Malcolm L. Monroe,
1424 Whitney Building,
New Orleans 12, Louisiana.

August 13, 1962.

Filed August 13, 1962

United States District Court for the District of Columbia

Civil Action No. 1857-62

[Title Omitted]

Motion of Intervening Defendant for Summary Judgment

Comes now Intervening Defendant Whitney National Bank in Jefferson Parish, through its undersigned counsel, and moves the Court to enter summary judgment in its favor as prayed for in the original answer and the supplemental answer filed herein on the grounds that there is no genuine issue herein as to any material fact and that it is entitled to judgment as a matter of law. Attached in support of this motion are an affidavit of E. A. Waffenschmidt, dated August 3, 1962; and a Supplemental affidavit of James J. Gilly, dated August 3, 1962, a Statement of Facts As To Which There is No Genuine Issue filed pursuant to Local Civil Rule 9(h), and a printed Statement of Points and Authorities.

In further support of this motion, specific reference is here made to the following affidavits with exhibits attached:

1. Affidavit of James J. Saxton, Comptroller of the Currency, dated June 20, 1962.

2. Affidavit of Morgan L. Whitney, dated June 25, 1962.
3. Affidavit of James J. Gilly, dated June 16, 1962.

General reference is also made to the other papers on file in this action, since a motion for summary judgment searches the entire record before the Court.

W. Graham Claytor, Jr.,
701 Union Trust Building
Washington 5, D. C.

Malcolm L. Monroe,
1424 Whitney Building,
New Orleans 12, Louisiana.

August 13, 1962.

Filed August 13, 1962

United States District Court for the District of Columbia

Civil Action No. 1857-62

[Title omitted]

Statement of Intervening Defendant Whitney National Bank in Jefferson Parish of Material Facts as to Which There is no Genuine Issue

Intervening defendant Whitney National Bank in Jefferson Parish, in support of its motion for summary judgment herein and pursuant to local Civil Rule 9(h), sets forth the following statement of material facts as to which there is no genuine issue in this case:

(1) Intervening defendant Whitney National Bank in Jefferson Parish, and Whitney National Bank of New Orleans, are national banking associations organized under 12 U.S.C. §§ 21 et seq., and are wholly owned subsidiaries (except for directors' qualifying shares) of Whitney Holding Corporation, a bank holding company incorporated under the laws of Louisiana and duly registered under the Bank Holding Company

Act of 1956, 12 U.S.C. §§ 1841-48. (Saxon Affidavit of June 20, 1962.)

(2) The present status of these three corporations was achieved pursuant to a plan which provided that Whitney National Bank of New Orleans, by consent of its stockholders and in accordance with appropriate approvals of the Comptroller of the Currency, the Federal Deposit Insurance Corporation and the Board of Governors of the Federal Reserve System, would reorganize so that its stockholders would own stock of the Whitney Holding Corporation, a registered bank holding company, in the same proportion in which they formerly owned stock of the bank, and Whitney Holding Corporation in turn would own all of the Stock of Whitney National Bank of New Orleans. The plan further provided that Whitney Holding Corporation with approval of the Comptroller of the Currency and of the Federal Reserve Board would organize as another wholly owned subsidiary the Whitney National Bank in Jefferson Parish, utilizing as its capital funds some $642,000 to be paid to Whitney Holding Corporation as a dividend out of undivided profits of Whitney National Bank of New Orleans, plus the funds subscribed by its directors for their qualifying shares. The steps pursuant to which this program was achieved are summarized hereafter. (Saxon Affidavit of June 20, 1962; Defendant's Exhibit 6.)

(3) On July 20, 1961, Whitney National Bank of New Orleans caused to be organized a Louisiana corporation under the name of "Whitney Holding Corporation," all the stock of which was issued to Whitney National Bank of New Orleans and promptly distributed to the stockholders of Whitney National Bank of New Orleans as a dividend. (Saxon Affidavit of June 20, 1962.)

(4) On June 28, 1961, there were filed with the Comptroller of the Currency three applications:

(a) To organize a new national banking association in New Orleans under the name of Crescent City National Bank as a wholly owned subsidiary of Whitney Holding Corporation;

(b) To consolidate Whitney National Bank of New Orleans into Crescent City National Bank under the name of the former, the stockholders of the

former Whitney National Bank of New Orleans to receive for their stock in that bank stock in Whitney Holding Corporation;

(c) To organize a new national banking association in Jefferson Parish under the name of "Whitney National Bank in Jefferson Parish", as a wholly owned subsidiary of Whitney Holding Corporation.

(5) On July 14, 1961 Whitney Holding Corporation filed with the Federal Reserve Board an application to become a registered bank holding company under the provisions of the Bank Holding Company Act of 1956, 12 U.S.C. §§ 1841-48. Notice of the receipt of this application was published in the *Federal Register* on July 28, 1961, which provided an opportunity for submission of views regarding the application. (Plaintiffs' Exhibit 1.)

(6) On October 3, 1961, the Comptroller of the Currency gave preliminary approval to the formation of two new national banks, the Crescent City National Bank and the Whitney National Bank in Jefferson Parish, subject to approval by the Federal Reserve Board of the application of Whitney Holding Corporation to become a bank holding company by acquiring the stock of Cescent City National Bank (to be renamed Whitney National Bank of New Orleans) and Whitney National Bank in Jefferson Parish. (Saxon Affidavit of June 20, 1961, p. 7.)

(7) By order dated December 19, 1961, duly published in the *Federal Register* on December 22, 1961, the Federal Reserve Board scheduled for January 17, 1962, a public hearing on the application of Whitney Holding Corporation. At the public hearing held on January 17, 1962, representatives of Whitney Holding Coporation presented their arguments and all opponents of the application were given a full opportunity to be heard. None of the plaintiffs herein appeared at this public hearing or submitted any opposition to the application. (Saxon Affidavit of June 20, 1962, p. 5; Defendant's Exhibit 3; Defendant's Exhibit 5, p. 1.)

(8) On May 3, 1962, the Federal Reserve Board approved the application of Whitney Holding Corporation to become a registered bank holding company by

acquiring the stock of the Crescent City National Bank (to be renamed Whitney National Bank of New Orleans) and the Whitney National Bank in Jefferson Parish. (Saxon Affidavit of June 20, 1962, p. 5; Defendant's Exhibit 5.)

(9) On May 10, 1962, Whitney National Bank in Jefferson Parish executed and delivered to the Comptroller of the Currency Articles of Association and the Certificate of Organization pursuant to 12 U.S.C. § 24. By letter dated May 11, 1962 William B. Camp, Deputy Comptroller of the Currency, recognized the corporate existence of Whitney National Bank in Jefferson Parish as a national banking association.

(10) On May 18, 1962, the Comptroller of the Currency approved the consolidation of the existing Whitney National Bank of New Orleans into the Crescent City National Bank under the name Whitney National Bank of New Orleans. Under the terms of this consolidation the shareholders of the old Whitney National Bank of New Orleans exchanged their shares of stock for stock of Whitney Holding Corporation, dissenting shareholders being entitled to appraisal and purchase of their shares under the provisions of the National Banking Act. There were no dissenting shareholders. At this point, accordingly, the former shareholders of the old Whitney National Bank of New Orleans owned all of the stock of Whitney Holding Corporation which in turn owned all of the stock (except directors' qualifying shares) of the new Whitney National Bank of New Orleans (formerly Crescent City National Bank) and of the newly organized Whitney National Bank in Jefferson Parish. (Saxon Affidavit of June 20, 1962, p. 6.)

(11) Thereafter with the approval and in accordance with the regulations of the Federal Reserve Board, Whitney National Bank of New Orleans transferred to Whitney Holding Corporation a dividend of $650,000 paid out of its undivided profits available for payment of dividends. $642,000 of these funds were transferred by Whitney Holding Corporation to its subsidiary, the newly organized Whitney National Bank in Jefferson Parish. These funds, together with $8,000 subscribed by the new directors for their qualifying shares, constitute the initial capital funds of

$650,000 of Whitney National Bank in Jefferson Parish. (Saxon Affidavit of June 20, 1962, p. 6; Defendant's Exhibit 6.)

(12) The first meeting of the stockholders of Whitney National Bank in Jefferson Parish was held on May 24, 1962, and directors of the said bank were properly elected. The directors of the Whitney National Bank in Jefferson Parish have paid the purchase price for their qualifying shares, have been sworn, qualified and have taken office as directors. By-laws have been adopted. Officers of the bank have been elected. Stock of the Federal Reserve Bank of Atlanta in the amount of $18,000.00 has been subscribed and paid for by Whitney National Bank in Jefferson Parish in its own name. (Saxon Affidavit of June 20, 1962, p. 6.)

(13) The present suit was filed on June 9, 1962, just as the Comptroller of the Currency was about to issue a Certificate of Authority pursuant to 12 U.S.C. § 27, permitting the Whitney National Bank in Jefferson Parish to commence banking operations. (Complaint.)

(14) Upon being advised of the filing or impending filing of this suit, the Comptroller of the Currency voluntarily agreed to withhold issuance of his Certificate of Authority to Whitney National Bank in Jefferson Parish until a motion for preliminary injunction filed by the plaintiffs in such suit could be determined. (Tr. June 27, 1962, pp. 3-4.)

(15) On June 27, 1962, the Comptroller of the Currency refused voluntarily to withhold issuance of the said Certificate of Authority any longer. Thereupon Judge Hart on application of the plaintiffs granted a temporary restraining order directing the Comptroller to withhold his Certificate until July 6, 1962. (Tr. June 27, 1962, pp. 24-25; temporary restraining order dated June 27, 1962.)

(16) On July 6, 1962, Judge Holtzoff granted plaintiffs' motion for a preliminary injunction, and on July 10, 1962, signed the preliminary injunction herein. (Tr. July 6, 1962, p. 86; preliminary injunction dated July 10, 1962.)

(17) Had it not been for the institution of these proceedings on June 9, 1962, the Comptroller of the Currency would have issued a Certificate of Authority

under 12 U.S.C. § 27 permitting the Whitney National Bank in Jefferson Parish to commence banking operations on or about that date and such banking operations would in fact have been commenced at that time. (Gilly Affidavit of August 3, 1962; Tr. June 27, 1962, p. 13.)

(18) Had it not been for issuance of the temporary restraining order on June 27, 1962, and the preliminary injunction on July 6, 1962, the Comptroller of the Currency would, on or about the former date, have issued a Certificate of Authority permitting the Whitney National Bank in Jefferson Parish to commence banking operations, and such banking operations would then immediately have been commenced. (Gilly Affidavit of August 3, 1962; Tr. June 27, 1962, pp. 8, 10, 12.)

(19) On July 10, 1962, Act No. 275 of the 1962 regular session of the Louisiana Legislature, purporting to regulate bank holding companies, was enacted into law. (Plaintiffs' Exhibit L.)

Respectfully submitted,

W. Graham Claytor, Jr.,
701 Union Trust Building,
Washington 5, D. C.

Malcolm L. Monroe,
1424 Whitney Building,
New Orleans 12, Louisiana.

August 13, 1962.

Filed August 13, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

[Title omitted]

AFFIDAVIT IN SUPPORT OF INTERVENING DEFENDANT

STATE OF LOUISIANA,
Parish of Orleans.

Before me, the undersigned authority, A Notary Public duly qualified and commissioned in the Parish of Orleans, State of Louisiana, personally came and appeared:

E. A. WAFFENSCHMIDT, who, being by me duly sworn, did depose and state that:

(1) Affiant is a resident of the City of New Orleans, State of Louisiana, and is the Cashier and Assistant Vice President of Whitney National Bank in New Orleans. This affidavit is made and filed in support of the motion for summary judgment filed by Whitney National Bank in Jefferson Parish, Intervening Defendant in the above entitled proceedings.

(2) At the Stockholders Meeting of the Whitney National Bank held pursuant to due notice on November 29, 1961, affiant served as Secretary of this meeting. In his capacity as Secretary of the said meeting, affiant was charged with responsibility for presenting the final recapitulation of the vote on the resolution. Affiant declares that the attached Tabulation of Vote, marked Whitney Exhibit No. 5, on the resolution to ratify the consolidation agreement between Whitney National Bank of New Orleans and Crescent City National Bank is true and accurate in every respect.

(3) Affiant further declares that none of the stockholders of Whitney National Bank voting against the consolidation

agreement have requested that the value of their shares be appraised pursuant to 12 U.S.C. 215.

E. A. WAFFENSCHMIDT.

Sworn and subscribed before me, this 3rd day of August, 1962.

Melvin A. Schwartzman,
Notary Public.

My commission is issued for life.

INTERVENING DEFENDANT EXHIBIT 5

TABULATION OF VOTE

Resolution: Ratification and Confirmation Agreement between Whitney National Bank of New Orleans and Hibernia National Bank

		TOTAL
In Favor of; In Person	111	
By Proxy	93,183	93,645
Against: In Person	462	
By Proxy	7,143	7,145

John C. Shea
REGISTRAR

Approved
JUDGES OF ELECTION

By _____
Chairman

Approved and certified:

By _____
Secretary

328

TABULATION OF VOTE

Resolution: 3 - C. Thompson Board of Directors to proceed with leasing with the Commodore Agreement

			TOTAL
In Favor of;	In Person	7,77	
	By Proxy	93,047	93,774
Against:	In Person	4881	
	By Proxy	7143	12,024

Esther R. Shea
REGISTRAR

Approved
JUDGES OF ELECTION

By W. McDonald
Chairman

Approved and certified:

By Ted Weiss
Secretary

Filed August 13, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

[Title omitted]

AFFIDAVIT IN SUPPORT OF INTERVENING DEFENDANT

STATE OF LOUISIANA,
Parish of Orleans.

Before me, the undersigned authority, personally came and appeared:

JAMES J. GILLY, who, being by me duly sworn, deposes and says:

(1) I am a resident of the City of New Orleans and President of the Whitney National Bank in Jefferson Parish. This affidavit is made to supplement the Affidavit made in these proceedings on June 16, 1962 and is filed in support of Intervening Defendant's Motion for Summary Judgment.

(2) The Whitney National Bank in Jefferson Parish would have been open for business prior to June 27, 1962, had it received a certificate to open from the Comptroller of the Currency. Attached hereto for identification is the 1962 Legislative Calendar of the State of Louisiana, marked Whitney Exhibit No. 1, and the Official Journal of the House of Representatives of the State of Louisiana for June 27, 1962, marked Whitney Exhibit No. 2.

(3) As is shown on the attached List of Directors of Whitney National Bank of New Orleans, marked Whitney Exhibit No. 3, and List of Directors of Whitney National Bank in Jefferson Parish, marked Whitney Exhibit No. 4, both of which are on file with the Office of the Comptroller of Currency, there are only four directors common to each Board.

JAMES J. GILLY.

Sworn and subscribed before me, this 3rd day of August, 1962.

MELVIN A. SCHWARTZMAN,
Notary Public.

My Commission is issued for life.

EXHIBIT 1

1962

LEGISLATIVE CALENDAR

OF THE

STATE OF LOUISIANA

TWENTY-FIFTH REGULAR SESSION

OF THE LEGISLATURE

UNDER THE CONSTITUTION OF 1921

SEVENTH WEEK

Ending June 30, 1962

BY AUTHORITY

C. C. AYCOCK
Lieutenant Governor
and President of the Senate

J. THOS. JEWELL
Speaker
House of Representatives

C. W. ROBERTS

W. CLEGG COLE

TWENTY-FIFTH REGULAR SESSION

OF THE LEGISLATURE

UNDER THE CONSTITUTION OF 1921

SEVENTH WEEK

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BY AUTHORITY

C. C. AYCOCK
Lieutenant Governor
and President of the Senate

C. W. ROBERTS
Secretary
Louisiana Senate

J. THOS. JEWELL
Speaker
House of Representatives

W. CLEGG COLE
Clerk
House of Representatives

331

June 4—
Read by title and referred to the Committee on Judiciary, Section B

HOUSE BILL No. 1221—
By Mr. Angelle (By Request):
AN ACT
To define the bank holding company, to prohibit the formation of new bank holding companies, and to control the future expansion of existing bank holding companies and of their subsidiaries.

HOUSE

June 3—
Read by title.

June 4—
Read by title and referred to the Committee on Judiciary, Section B

June 11—
Reported favorably.

June 14—
Read by title, ordered engrossed and passed to its third reading.

June 19—
Returned to the Calendar subject to call.

June 25—
Made Special Order of the Day for Wednesday, June 27.

June 27—
Called from the Calendar.
Read by title. Considered in Committee of the Whole, reported with amendments, amended, read the third time in full, as amended, roll called on final passage, yeas 80, nays 16. Finally passed, title adopted, ordered to Senate.

SENATE

June 28—
Received in the Senate.
R.S., read first and second time by title and referred to the Committee on
Banking
Rules suspended
Recommitted to the Committee on
Judiciary, Section B

HOUSE BILL No. 1222—
By Mr. Boozman:
AN ACT
To amend and re-enact Paragraph (6) of Subsection (A) of Section 742 of Title 17 of the Louisiana Revised Statutes of 1950, and to amend said Subsection (A) by adding thereto a new Paragraph (7), all relative to qualifications for eligibility to receive old age assistance for teachers from funds dedicated or allocated out of the State Public School Fund, to further provide for qualifications for eligibility.

HOUSE

June 3—
Read by title.

June 4—
Read by title and referred to the Committee on Judiciary, Section B

June 11—
Reported without action by the Committee on Judiciary, Section B.
with recommendation that it be recommitted to the Committee on
Joint Committee on Retirement.

June 12—
Recommitted to the Committee on

June 20—
Read third time in full, roll called on final passage, yeas 94, nays 0. Finally passed, title adopted, ordered to Senate.

SENATE

June 21—
Received in the Senate.
R.S., read first and second time by title and referred to the
Joint Committee on Retirement.

HOUSE BILL No. 1223—
By Mr. Casey (By Request):
AN ACT
To divide the City of New Orleans into wards, representative districts and municipal districts; providing that all public officials elected and now holding office from the wards, representative districts, municipal districts, councilmanic districts and senatorial districts of the City of New Orleans, as such wards and districts were described and established as of May 1, 1962 in Section 2 of Act 159 of 1912 and Section.....of the Charter of the City of New Orleans and in Sections 4 and 5 of Article III of the Constitution of Louisiana, shall serve the remainder of the terms for which they were elected.

HOUSE

June 3—
Read by title.

June 4—
Read by title and referred to the Committee on Judiciary, Section A

HOUSE BILL No. 1224—
By Mr. Barranger:
AN ACT
To authorize the governing authorities of all municipalities in this State to adopt ordinances regulating the business of purchasing, selling, transferring, exchanging, repairing or storing of new or second hand bicycles, parts and accessories for bicycles, at wholesale or retail, and to provide for the registration of description and ownership of bicycles; and repealing Sections 491 through 501 of Title 51 of the Louisiana Revised Statutes of 1950.

HOUSE

June 3—
Read by title.

June 4—
Read by title and referred to the Committee on Judiciary, Section B

June 7—
Reported favorably.

June 11—
Read by title, ordered engrossed and passed to its third reading.

June 13—
Read third time in full, roll called on final passage, yeas 87, nays 2. Finally passed, title adopted, ordered to Senate.

SENATE

June 14—
Received in the Senate.
R.S., read first and second time by title and referred to the Committee on
Judiciary, Section A

HOUSE BILL No. 1225—
By Mr. Womack and Senator Gilbert:
AN ACT

Judiciary, Section B

June 11—
Reported favorably.

June 14—
Read by title, ordered engrossed and passed to its third reading.

June 19—
Returned to the Calendar subject to call.

June 25—
Made Special Order of the Day for Wednesday, June 27.

June 27—
Called from the Calendar.
Read by title. Considered in Committee of the Whole, reported with amendments, amended, read the third time in full, as amended, roll called on final passage, yeas 80, nays 16. Finally passed, title adopted, ordered to Senate.

SENATE

June 28—
Received in the Senate.
R.S., read first and second time by title and referred to the Committee on
Banking
Rules suspended
Recommitted to the Committee on
Judiciary, Section B

HOUSE BILL No. 1222—
By Mr. Boozman:

AN ACT

To amend and re-enact Paragraph (6) of Subsection (A) of Section 742 of Title 17 of the Louisiana Revised Statutes of 1950, and to amend said Subsection (A) by adding thereto a new Paragraph (7), all relative to qualifications for eligibility to receive old age assistance for teachers from funds dedicated or allocated out of the State Public School Fund, to further provide for qualifications for eligibility.

HOUSE

June 3—
Read by title.

June 4—
Read by title and referred to the Committee on
Judiciary, Section B

June 11—
Reported without action by the Committee on
Judiciary, Section B.
with recommendation that it be recommitted to the Committee on
Joint Committee on Retirement.

June 12—
Recommitted to the Committee on
Joint Committee on Retirement

June 13—
Reported with amendments.

June 18—
Read by title, amended, ordered engrossed and passed to its third reading.

cilmanic districts and senatorial districts of the City of New Orleans, as such wards and districts were described and established as of May 1, 1962 in Section 2 of Act 159 of 1912 and Section.....of the Charter of the City of New Orleans and in Sections 4 and 5 of Article III of the Constitution of Louisiana, shall serve the remainder of the terms for which they were elected.

HOUSE

June 3—
Read by title.

June 4—
Read by title and referred to the Committee on
Judiciary, Section A

HOUSE BILL No. 1224—
By Mr. Barranger:

AN ACT

To authorize the governing authorities of all municipalities in this State to adopt ordinances regulating the business of purchasing, selling, transferring, exchanging, repairing or storing of new or second-hand bicycles, parts and accessories for bicycles, at wholesale or retail, and to provide for the registration of description and ownership of bicycles; and repealing Sections 491 through 501 of Title 51 of the Louisiana Revised Statutes of 1950.

HOUSE

June 3—
Read by title.

June 4—
Read by title and referred to the Committee on
Judiciary, Section B

June 7—
Reported favorably.

June 11—
Read by title, ordered engrossed and passed to its third reading.

June 13—
Read third time in full, roll called on final passage, yeas 87, nays 2. Finally passed, title adopted, ordered to Senate.

SENATE

June 14—
Received in the Senate.
R.S., read first and second time by title and referred to the Committee on
Judiciary, Section A

HOUSE BILL No. 1225—
By Mr. Womack and Senator Gilbert:

AN ACT

To provide for the manner of fixing of the salary of the President and the Secretary of the Board of Commissioners of the Tensas Basin Levee District; and repealing all laws or parts of laws, in conflict herewith.

HOUSE

June 3—
Read by title.

EXHIBIT 1

Filed August 13, 1962

EXHIBIT 2

OFFICIAL JOURNAL
OF THE
HOUSE OF REPRESENTATIVES
OF THE
STATE OF LOUISIANA

THIRTY-SECOND DAY'S PROCEEDINGS

Twenty-fifth Regular Session of the
Legislature Under the Adoption of
the Constitution of 1921

House of Representatives
State Capitol
State of Louisiana

Wednesday, June 27, 1962, Baton Rouge, La.

The House was called to order at 1:00 o'clock p.m., by Hon. J. Thos. Jewell, Speaker of the House of Representatives

ROLL CALL

The roll being called, the following members answered to their names:

PRESENT

Messrs.—

Mr. Speaker	Crane	Mollere
Adams	Decuir	Morgan
Alford	Delony	Munson
Allen, H. (Tangipahoa)	Downes	Murtes
Allen, I. J. (Jackson)	Dupont	Napper
Altmyer	Dupuis	O'Brien
Ammons	Durand	Ordoneaux
Angelle	Dyer	Peck
Anzelmo	Dyson	Perron
Arceneaux	Falgout	Pfister
Ashley	Fields	Rand
Barranger	Floyd	Rau
Beebe	Fondren	Richmond
Beenel	Fulco	Roy
Beeson	Garrett	Sanders
Bernard, D. A. (Lafourche)	Gibbs	Schoenberger
Bernard, E. L. (W. B. R.)	Gregson	Schwegmann
Bernhard	Grizzaffi	Seaman
Bertrand	Himel	Sheridan
Bethard	Hoover	Simon
Bickford	Jack	Smith, B. (Avoyelles)
Bolden	John	Smith, P. K. (Winn)
Boezman	Jumonville	Smither
Branton	Knowles	Steen
Brown, A. D. (Caddo)	Lancaster	Stinson
Brown, J. M. (Calcasieu)	Landrieu	Strother
Brown, W. K. (Grant)	Leake	Sullivan
	LeBreton	Sylvester
	Lehmann	Tapper
	Lewis	Thomas
	Matassa	Trahan
	McCormick	
	McCrary	

Mr. B[illegible]and In The Chair

House Business Resumed

Speaker Jewell In The Chair

The committee having risen, the chairman, Mr. Bertrand reported to the House that the Committee of the Whole had had under consideration:

HOUSE BILL No. 1221—
By Mr. Angelle (By Request):
AN ACT

To define the bank holding company, to prohibit the formation of new bank holding companies, and to control the future expansion of existing bank holding companies and of their subsidiaries.

Reported with thefollowing amendments:

HOUSE FLOOR AMENDMENTS

Amendments proposed by Mr. Anzelmo to House Bill No. 1221 by Mr. Angelle.

Amend Printed bill as follows:

AMENDMENT No. 1—
On page 1, between lines 7 and 8, insert the following: "Be it enacted by the Legislature of Louisiana:"

AMENDMENT No. 2—
On page 1, strike out line 8 in its entirety and insert in lieu thereof the following:
"Section 1. Declaration of Policy."

AMENDMENT No. 3—
On page 1, strike out line 21 in its entirety and insert in lieu thereof the following:
"Section 2. Definitions."

AMENDMENT No. 4—
On page 3, strike out lines 11 and 12 in their entirety and insert in lieu thereof the following:
"Section 3. Prohibitions upon Acquisition of Bank Shares or Assets."

AMENDMENT No. 5—
On page 3, strike out line 29 in its entirety and insert in lieu thereof the following:
"Section 4. Penalties."

AMENDMENT No. 6—
On page 4, strike out line 8 in its entirety and insert in lieu thereof the following:
"Section 5. Administration"

AMENDMENT No. 7—
On page 4, strike out line 13 in its entirety and insert in lieu thereof the following:
"Section 6. Savings Clause."

AMENDMENT No. 8—
On page 4, strike out line 21 in its entirety and insert in lieu thereof the following:
"Section 7. Severability."

AMENDMENT No. 9—
On page 4, after line 26 add the following lines:
"Section 8. Repeal.
All laws or parts of laws in conflict herewith are hereby repealed."

HOUSE FLOOR AMENDMENTS

their names:

PRESENT

Messrs.—		
Mr. Speaker	Crane	Mollere
Adams	Decuir	Morgan
Alford	Delony	Munson
Allen, H. (Tangipahoa)	Downes	Murtes
Allen, I. J. (Jackson)	Dupont	Napper
Altmyer	Dupuis	O'Brien
Ammons	Durand	Ordoneaux
Angelle	Dyer	Peck
Anzelmo	Dyson	Perron
Arceneaux	Falgout	Pfister
Ashley	Fields	Rand
Barranger	Floyd	Rau
Becnel	Fondren	Richmond
Beeson	Fulco	Roy
Bernard, D. A. (Lafourche)	Garrett	Sanders
Bernard, E. L. (W. B. R.)	Gibbs	Schoenberger
Bernhard	Gregson	Schwegmann
Bertrand	Grizzaffi	Seaman
Bethard	Himel	Sheridan
Bickford	Hoover	Simon
Bolden	Jack	Smith, B. (Avoyelles)
Boozman	John	Smith, P. K. (Winn)
Branton	Jumonville	Smither
Brown, A. D. (Caddo)	Knowles	Steen
Brown, J. M. (Calcasieu)	Lancaster	Stinson
Brown, W. K. (Grant)	Landrieu	Strother
Buras	Leake	Sullivan
Casey	LeBreton	Sylvester
Ciaccio	Lehmann	Tapper
Cooper	Lewis	Thomas
Crais	Matassa	Triche
Total—103.	McCormack	Vesich
	McCrary	Villar
	McGehee	Womack
	McGittigan	
	McHenry	
	McLain	
	Michot	

ABSENT

Messrs.—	
Foshee	Smith, J. K. (Caddo)
Total—2.	

The Speaker of the House announced that there were 163 members present and a quorum.

Prayer

Prayer was offered by the Rev. Lee Porter.

Reading of the Journal

On motion of Mr. I. J. Allen, the reading of the Journal was dispensed with.

On motion of Mr. I. J. Allen, the Journal of yesterday was adopted.

Special Order Of The Day

House Bills and Joint Resolutions on Third Reading and Final Passage

The following entitled House Bills and Joint Resolutions on third reading and final passage were taken up and acted upon as follows:

HOUSE BILL No. 1221—

[illegible] Anzelmo (By Request):

AN ACT

To define the bank holding company, to prohibit the formation of new bank holding companies, and to control the future expansion of existing bank holding companies and of their subsidiaries.

Taken up on its third reading.

On motion of Mr. Anzelmo the House resolved itself into a Committee of the Whole to take into consideration the bill.

AMENDMENT No. 4—
On page 2, strike out lines 11 and 12 in their entirety and insert in lieu thereof the following:
"Section 3. Prohibitions upon Acquisition of Bank Shares or Assets."

AMENDMENT No. 5—
On page 3, strike out line 29 in its entirety and insert in lieu thereof the following:
"Section 4. Penalties."

AMENDMENT No. 6—
On page 4, strike out line 8 in its entirety and insert in lieu thereof the following:
"Section 5. Administration."

AMENDMENT No. 7—
On page 4, strike out line 13 in its entirety and insert in lieu thereof the following:
"Section 6. Savings Clause."

AMENDMENT No. 8—
On page 4, strike out line 21 in its entirety and insert in lieu thereof the following:
"Section 7. Severability."

AMENDMENT No. 9—
On page 4, after line 26 add the following lines:
"Section 8. Repeal.
All laws or parts of laws in conflict herewith are hereby repealed."

HOUSE FLOOR AMENDMENTS

Amendments proposed by Mr. Anzelmo to House Bill No. 1221 by Mr. Angelle

Amend Printed bill as follows:

AMENDMENT No. 1—
On page 1, line 22, following the word "company" and preceding the word "in-" , in-sert the words "foreign or domestic".

AMENDMENT No. 2—
On page 2, line 19, following the word "solicitation" insert the following:
"(C) nor shall this act apply to shares acquired by a bank holding company which is a bank, or by any banking subsidiary of a bank holding company, in satisfaction of a debt previously contracted in good faith, but such bank holding company or such subsidiaries shall dispose of such shares within a period of two years from the date on which they were acquired or from the date of enactment of this Act, whichever is later.
(D) or shall this act apply to shares which are held or acquired by a bank holding company which is a bank or by any banking subsidiary of a bank holding company, in good faith in a fiduciary capacity; except where such shares are held for the benefit of the shareholders of such bank holding company or any of its subsidiaries, or to shares which are of the kinds and amounts eligible for investment by National banking associations under the provisions of section 5136 of the Revised Statutes; or to shares lawfully acquired and owned prior to the date of enactment of this Act by a bank which is a bank holding company, or by any of its wholly owned subsidiaries.

AMENDMENT No. 3—
On page 2, line 12, delete the words "joint venture".

AMENDMENT No. 4—
On page 2, line 13, delete the figure "(1)".

AMENDMENT No. 5—
On page 2, line 15, delete the words "or (2) any corpora-" and delete lines 16 through 22 in their entirety.

AMENDMENT No. 6—
On page 3, line 21, following the word "thereof" change the period to a semi-colon and add the following:
(5) for any bank holding company or subsidiary thereof to open for business any bank not now opened for business, whether or not, a charter, permit, license or certificate to open for business has already been issued.

AMENDMENT No. 7—
On page 1, line 24, delete the figure "15" and insert in lieu thereof the figure "25"

AMENDMENT No. 8—
On page 1, line 28, delete the number "15" and insert in lieu thereof "25"

AMENDMENT No. 9—
On page 2, line 27, delete the number "15" and insert in lieu thereof the figure "25"

AMENDMENT No. 10—
On page 3, line 1, delete the number "16" and insert in lieu thereof the number "25"

AMENDMENT No. 11—
On page 3, line 19, strike out the number "5" and insert in lieu thereof the figure "25"

On motion of Mr. Anzelmo the report of the committee, together with the amendments, was adopted.

The Bill was read in full, as amended.

Mr. Angelle moved the final passage of the Bill.

ROLL CALL

The roll was called with the following result:

YEAS

Messrs.—

Adams	Cooper	Napper
Alford	Crane	Orgeneaux
Allen, H. (Tangipahoa)	Decuir	Peck
Allen, I. J. (Jackson)	Delony	Perron
Altmyer	Downey	Pfister
Ammons	Dupont	Rand
Angelle	Dupuis	Rau
Anzelmo	Durand	Richmond
Arceneaux	Dyer	Roy
Ashley	Fulgout	Sanders
Becnel	Floyd	Schoenberger
Beeson	Fondren	Schwegmann
Bernard, D. A. (Lafourche)	Garrett	Seaman
Bernard, E. L. (W. B. R.)	Gibbs	Sheridan
Bernhard	Hoover	Smith, B. (Avoyelles)
Bertrand	Jack	Smith, P. K. (Winn)
Bethard	John	Steen
Bickford	Junionville	Strother
Bolden	Lancaster	Sullivan
Branton	Lehmann	Sylvester
Brown, J. M. (Calcasieu)	Lewis	Tapper
Brown, W. K. (Grant)	Matassa	Thomas
Burns	McCormack	Trichel
Ciaccio	McCrary	Vesich
	McGehee	Vinar
	McGittigan	Womack
	McHenry	
	Michot	
	Morgan	
	Munson	

TOTAL—80

NAYS

AMENDMENT No. 9—
On page 2, line 27, delete the number "15" and insert in lieu thereof the figure "25"

AMENDMENT No. 10—
On page 3, line 1, delete the number "16" and insert in lieu thereof the number "25"

AMENDMENT No. 11—
On page 3, line 19, strike out the number "5" and insert in lieu thereof the figure "25"

On motion of Mr. Anzelmo the report of the committee, together with the amendments, was adopted.

The Bill was read in full, as amended.

Mr. Angelle moved the final passage of the Bill.

ROLL CALL

The roll was called with the following result:

YEAS

Messrs.—

Adams	Cooper	Napper
Alford	Crane	Oriogneaux
Allen, H. (Tangipahoa)	Decuir	Pecs
Allen, I. J. (Jackson)	Delony	Perron
Altmyer	Downes	Pfister
Ammons	Dupont	Rand
Angelle	Dupuis	Rau
Anzelmo	Durand	Richmond
Arceneaux	Dyer	Roy
Ashley	Falgout	Sanders
Bagnel	Floyd	Schoenberger
Beeson	Fondren	Schwegmann
Bernard, D. A., (Lafourche)	Garrett	Seaman
Bernard, E. L. (W. B. R.)	Gibbs	Sheridan
Bernhard	Hoover	Smith, B. (Avoyelles)
Bertrand	Jack	Smith, P. K. (Winn)
Bethard	John	Steen
Bickford	Jumonville	Strother
Bolden	Lancaster	Sullivan
Branton	Lehmann	Sylvester
Brown, J. M. (Calcasieu)	Lewis	Tapper
Brown, W. K. (Grant)	Matassa	Thomas
Buras	McCormack	Triche
Chaccio	McCrary	Vesich
	McGehee	Villar
	McGittigan	Womack
	McHenry	
	Michot	
	Morgan	
	Munson	

Total—80.

NAYS

Messrs.—

Barranger	Dyson	Landrieu
Boozman	Fulco	Le Breton
Brown, A. D. (Caddo)	Gregson	O'Brien
Casey	Grizzaffi	Smither
Crais	Himel	Stinson
	Knowles	

Total—16.

ABSENT

Messrs.—

Mr. Speaker	McLain	Smith, J. K. (Caddo)
Fields	Mollere	
Foshee	Murtes	
Leake	Simon	

Total—9.

And the Bill was finally passed.

And the Chair declared that the above Bill was finally passed.

The title to the above Bill was read and adopted.

Mr. Angelle moved to reconsider the vote by which the above Bill was finally passed, and, on his own motion, the motion to reconsider was laid on the table.

Organization—Form 1063
TREASURY DEPARTMENT
OFFICE OF THE COMPTROLLER
OF THE CURRENCY
Revised July 24, 1934

LIST OF DIRECTORS

The WHITNEY National Bank

Located at NEW ORLEANS, LOUISIANA

Comptroller of the Currency,
Washington, D. C.

The following is a list of all the directors elected at the *November 29, 1961 Special meeting of shareholders of The Whitney National Bank of New Orleans, La. held on November 29, 1961, the required notice of which was given, no director, other officer, or employee having acted as proxy at said meeting.

106,497 shares of the common stock of the bank were represented at the meeting.

____ shares of the preferred stock of the bank were represented at the meeting.

	NAME	POST OFFICE ADDRESS
1		
2	SEE ATTACHED	LIST
3		
4		
5		
6		
8		
9		
10		
11		
12		
13		

At least two-thirds of the directors are residents of, and have resided for at least one year (immediately preceding their election), in the State, Territory, or District in which the Association is located, or within one hundred miles of the location of the principal office of the Association.

Respectfully,

[signature]

President or Cashier.

(*Insert "Adjourned" in case of [illegible]

of shareholders of The _____ National _____ Bank of _____ held on November 29, 1960, the required notice of which was given, no director, other officer, or employee having acted as proxy at said meeting.

106,497 shares of the common stock of the bank were represented at the meeting.

_____ shares of the preferred stock of the bank were represented at the meeting.

	NAME	POST OFFICE ADDRESS
1		
2	SEE ATTACHED	LIST
3		
4		
5		
6		
8		
9		
10		
11		
12		
13		

At least two-thirds of the directors are residents of, and have resided for at least one year (immediately preceding their election), in the State, Territory, or District in which the Association is located, or within one hundred miles of the location of the principal office of the Association.

Respectfully,

[signature]

President or Cashier.

(*Insert "Adjourned" in case of adjournment of meeting.)

IMPORTANT

There is no authority for the election of directors in advance of prescribed time, and if annual meeting of shareholders is held at a time earlier than that specified in the articles of association another meeting will be required.

When the day fixed for the regular annual meeting of the shareholders of a national bank falls on a legal holiday, the meeting shall be held on the next following banking day.

If a meeting is held at a time later than that specified in articles of association, explanation should be made under "Remarks" on the back of the sheet.

If number of directors elected does not correspond with the requirements of the articles of association on file here, this should also be explained.

[OVER]

16—6510-21

Filed August 13, 1962

EXHIBIT 3

LIST OF DIRECTORS

Name	Post Office Address
1. Edward B. Benjamin	1213 Whitney Bldg., N. O., La.
2. Keehn M. Berry	c/o Whitney Natl. Bank, N.O., La.
3. Hollis H. Crosby	Crosby, Mississippi
4. R. D. Crowell, Jr.	Long Leaf, Louisiana
5. W. K. DePass, Jr.	c/o Standard Supply & Hardware Co., P. O. Box 630, No. 6, La.
6. Crawford H. Ellis	P. O. Box 219, N. O., La.
7. Clifford F. Favret	209 Carondelet Bldg., N. O. 12, La.
8. James Gilly, Jr.	c/o Whitney Natl. Bank, N. O., La.
9. Leon Godchaux	c/o The Leon Godchaux Clothing Co., Ltd., 823 Canal St., N. O., La.
10. Leon Heymann	c/o Hymans Co., Ltd., 3201 Canal St., N. O., La.
11. H. T. Howard, Jr.	4534 St. Charles Ave., N.O. 15, La.
12. George A. Lotz	624 Conti St., N. O. 16, La.
13. Joseph T. Lykes, Jr.	Commerce Bldg., N. O., La.
14. Malcolm L. Monroe	c/o Monroe and Lemann, Whitney Bldg., N. O., La.
15. Jos. M. Montgomery	c/o United Fruit Co., 321 St. Chas. St., N. O. 4, La.
16. Ralph P. Nolan	Algiers Ferry Plaza, Algiers, La.

1.	Edward B. Benjamin	1213 Whitney Bldg., N. O., La.
2.	Keeba W. Berry	c/o Whitney Natl. Bank, N.O., La.
3.	Hollis H. Crosby	Crosby, Mississippi
4.	E. D. Crowell, Jr.	Long Leaf, Louisiana
5.	W. K. DePass, Jr.	c/o Standard Supply & Hardware Co., P. O. Box 630, N. O. 7, La.
6.	Crawford H. Ellis	P. O. Box 219, N. O., La.
7.	Clifford P. Favret	200 Carondelet Bldg., N. O. 12, La.
8.	James Gilly, Jr.	c/o Whitney Natl. Bank, N. O., La.
9.	Leon Godchaux	c/o The Leon Godchaux Clothing Co., Ltd., 825 Canal St., N. O., La.
10.	Leon Heymann	c/o Krauss Co., Ltd., 1201 Canal St., N. O., La.
11.	H. T. Howard, Jr.	4534 St. Charles Ave., N.O. 15, La.
12.	George A. Lotz	624 Canal St., N. O. 16, La.
13.	Joseph T. Lykes, Jr.	Commerce Bldg., N. O., La.
14.	Malcolm L. Monroe	c/o Monroe and Lemann, Whitney Bldg., N. O., La.
15.	Jos. M. Montgomery	c/o United Fruit Co., 321 St. Chas. St., N. O. 12, La.
16.	Ralph P. Nolan	Algiers Ferry Plaza, Algiers, La.
17.	Edgar B. Stern, Jr.	521 Royal St., N. O. 16, La.
18.	W. O. Turner	c/o Louisiana Power & Light Co. Algiers, La.
19.	Morgan Whitney	c/o Whitney Natl. Bank, N. O., La.
20.	Laurence M. Williams	c/o Williams, Inc., Whitney Bldg., New Orleans, La.

EXHIBIT 3

Filed August 13, 1962

EXHIBIT 4

LIST OF DIRECTORS

"Whitney National Bank in Jefferson Parish" (Organizing)
(Name of Bank)

Located at Jefferson Parish, Louisiana

Comptroller of the Currency,
Washington, D. C.

The following is a list of all the directors elected at the initial meeting of shareholders of The Whitney National Bank in Jefferson Parish (organizing) of Jefferson Parish, La. held on May 10, 1962, the required notice of which was given.

20,000 shares of the common stock of the bank were represented at the meeting.

NAME	POST OFFICE ADDRESS
W. O. Turner	142 Delaronde Street, Algiers, La.
A. B. Paterson, Jr.	1233 West Bank Expressway, Harvey, La.
W. K. DePass, Jr.	832 Nchoupitoulas Street, New Orleans, La.
Leon Godchaux, Jr.	828 Canal Street, New Orleans, La.
Henry J. Angelle	1200 S. Carrollton Avenue, New Orleans, La.
C. H. Botnick	1205 St. Charles Avenue, New Orleans, La.
James Gilly, Jr.	228 St. Charles Street, New Orleans, La.
Sterling Dunn	201 Baronne Street, New Orleans, La.

I hereby certify that at least two-thirds of the directors are residents of, and have resided for at least one year (immediately preceding their election), in the State, Territory or District in which the Association is located, or within one hundred miles of the location of the principal office of the Association.

Respectfully,

Located at _____ Jefferson Parish, Louisiana

Comptroller of the Currency,
Washington, D. C.

The following is a list of all the directors elected at the initial meeting of shareholders of The Whitney National Bank in Jefferson Parish Bank (organizing) of Jefferson Parish, La. held on May 10, 1962, the required notice of which was given.

20,000 shares of the common stock of the bank were represented at the meeting.

NAME	POST OFFICE ADDRESS
W. O. Turner	142 Delaronde Street, Algiers, La.
A. B. Paterson, Jr.	1233 West Bank Expressway, Harvey, La.
W. K. DePass, Jr.	832 Tchoupitoulas Street, New Orleans, La.
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C. H. Botnick	1205 St. Charles Avenue, New Orleans, La.
James Gilly, Jr.	228 St. Charles Street, New Orleans, La.
Sterling Dunn	201 Baronne Street, New Orleans, La.

I hereby certify that at least two-thirds of the directors are residents of, and have resided for at least one year (immediately preceding their election), in the State, Territory or District in which the Association is located, or within one hundred miles of the location of the principal office of the Association.

Respectfully,

James Gilly Jr.

Correspondent for the Organizers
Keehn W. Berry
228 St. Charles Street, New Orleans, La.

Subscribed and sworn to before me this 10th day of May, 1962.

Melvin I. Schwartzman
Notary Public
My Commission is Issued for Life.

MELVIN I. SCHWARTZMAN
Notary Public, Parish of Orleans, State of La.
My Commission is Issued for life

EXHIBIT 4

Filed August 13, 1962

Statement of Points and Authorities of Intervening Defendant

Appendix A

List of Bank Holding Companies and Their Affiliates Operating in States Which Prohibit or Limit Branch Banking

A. Bank Holding Companies and Their Subsidiary Banks Operating in States Which Prohibit Branch Banking

State	Bank Holding Company Operating in State	Affiliates in State and Location	
Colorado	Western Bancorporation	American National Bank,	Denver
		Englewood State Bank,	Englewood
		The First National Bank,	Fort Collins
Florida	Atlantic Trust Company	First Atlantic Nat'l Bank,	Daytona Beach
		The First National Bank,	Gainesville
		Atlantic National Bank,	Jacksonville
		Lake Forest Atlantic Bank,	"
		Southside Atlantic Bank,	"
		Springfield Atlantic Bank,	"
		Palatka Atlantic Nat'l Bank,	Palatka
		Sanford Atlantic Nat'l Bank,	Sanford
		Atlantic National Bank of West Palm Beach,	West Palm Beach
	Barnett National Securities Corp.	The Barnett National Bank,	Cocoa
		The Barnett National Bank,	Deland
		The Barnett National Bank,	Jacksonville
		Murray Hill Barnett Bank,	"
		St. Augustine National Bank,	St. Augustine
Illinois	Illinois Shares Corporation	State Bank of Blue Island,	Blue Island
		Pullman Trust & Savings Bank,	Chicago
		Standard State Bank,	"
	General Bancshares Corp.	Bank of Benton,	Benton
		Illinois State Bank,	Quincy
		Bank of Zeigler,	Zeigler
	Amalgamated Clothing Workers	Amalgamated Trust & Savings Bank,	Chicago
Montana	First Bank Stock Corp.	Midland National Bank,	Billings
		Valley State Bank,	Billings
		First National Bank,	Bozeman
		Metals Bank & Trust Co.,	Butte
		Forsyth State Bank,	Forsyth
		First Chouteau County Bank,	Fort Benton

		First National Bank,	Great Falls
		First Westside Nat'l Bank,	"
		First National Bank	Havre
		First Nat'l B. & T. Co.,	Helena
		First Trust Co.,	Helena
		First National Bank,	Lewistown
		First National Park Bank,	Livingston
		First National Bank,	Miles City
		Southside National Bank,	Missoula
		Western Montana Nat'l Bank,	"
	Montana Shares, Inc.	Northern Mont. State Bank,	Big Sandy
		Miners National Bank,	Butte
		First State Bank,	Chinook
		Liberty County Bank,	Chester
		Citizens Bank of Montana,	Havre
		Farmers-Merchants Bank,	Rudyard
	Northwest Bancorporation	Daly Bank & Trust Co.,	Anaconda
		Billings State Bank,	Billings
		First National Bank,	Dillon
		Great Falls National Bank,	Great Falls
		Union Bank & Trust Co.,	Helena
		First National Bank,	Kalispell
		Northwestern Bank,	Lewistown
	Western Bancorporation	Bank of Glacier County,	Cut Bank
		The Conrad National Bank,	Kalispell
		Montana Bank,	Great Falls
Texas	Texas Bank and Trust Company of Dallas	Texas Bank and Trust Co.,	Dallas
		First State Bank,	Eustace
		Powell State Bank,	Powell
		First National Bank,	Richland West
		West National Bank,	Fort Worth
	The Fort Worth National Bank	Riverside State Bank,	"
		South Fort Worth State Bank,	"
		Westside State Bank,	Houston
	G.B. Investment Corp.	Gulfgate State Bank,	LaPorte
		LaPorte State Bank,	Sealy
		Citizens State Bank,	Wallis
		Wallis State Bank,	

*II. Bank Holding Companies and Their Subsidiary Banks Operating in States Which Limit Branch Banking**

State	Bank Holding Company Operating in State	Affiliates in State and Location	
Iowa	Brenton Companies	Dallas County State Bank,	Adel
		Wright County State Bank,	Clarion
		Brenton State Bank,	Dallas Center
		National Bank of Des Moines,	Des Moines
		Northwest Des Moines Nat'l Bank,	"
		South Des Moines Nat'l Bank,	"
		Eagle Grove State Bank,	Eagle Grove
		Palo Alto County State Bank,	Emmetsburg
		Poweshiek County State Bank,	Grinnell
		Warren County B. & T. Co.,	Indianola
		Jefferson State Bank,	Jefferson
		First National Bank,	Perry
		Benton County B. & T. Co.,	Vinton
	Northwest Bancorporation	First National Bank,	Denison
		Iowa-Des Moines Nat'l Bank,	Des Moines
		First National Bank,	Mason City
		Live Stock National Bank,	Sioux City
Maine	Eastern Trust & Banking Company	Eastern T. & B. Co.,	Bangor
		Guilford Trust Company,	Guilford
		Lincoln Trust Co.,	Lincoln
		Millinocket Trust Co.,	Millinocket
New Mexico	Western Bancorporation	Bank of New Mexico,	Albuquerque
		First State Bank,	Gallup
		New Mexico B. & T. Co.,	Hobbs
		Roswell State Bank,	Roswell
		Santa Fe National Bank,	Santa Fe
South Dakota	First Bank Stock Corporation	Aberdeen National Bank,	Aberdeen
		First National Bank,	Clark
		First Potter County Bank,	Gettysburg
		First State Bank,	Highmore
		First National Bank,	Lemmon
		First National Bank,	Miller
		Nat'l Bank of South Dakota,	Sioux Falls

*States which have statutes prohibiting branch banking in other counties only when a bank already exists in the county and which are similar to the Louisiana branch banking statute.

	Northwest Bancorporation	First National Bank,	Aberdeen
		First Nat'l Bank of the Black Hills,	Rapid City
		Northwest Security Nat'l Bank,	Sioux Falls
		First Citizens Nat'l Bank,	Watertown
Washington	Old National Corporation	First National Bank,	Spokane
		The Old National Bank,	"
	Union Bond & Mortgage Company	Forks State Bank,	Forks
		First National Bank,	Port Angeles
		First American Nat'l Bank,	Port Townsend
		Bank of Sequim,	Sequim

(This information is contained in a publication by the Association of Registered Bank Holding Companies, entitled "Bank Holding Company Facts -1961," dated July, 1961.)

Filed August 13, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

[Title omitted]

STATEMENT OF GENUINE ISSUES FILED BY INTERVENING DEFENDANT WHITNEY NATIONAL BANK IN JEFFERSON PARISH IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT.

Intervening defendant Whitney National Bank in Jefferson Parish files this Statement in accordance with the provisions of Local Civil Rule 9(h).

Intervening defendant has today filed its own Motion for Summary Judgment and agrees with plaintiffs that there does not exist in this case any genuine issue of material fact. The case is accordingly one appropriate for disposition by summary judgment. Intervening defendant, however, joins in Defendant Comptroller's Opposition to Plaintiffs' Cross Motion filed August 10, 1962, and takes exception to the inclusion in Plaintiffs' Statement of Material Facts, filed herein pursuant to Rule 9(h), of substantial quantities of loose conclusory language, quotations, legal argument and other material. The relevant facts which present the controlling questions of law herein are more succinctly and accurately summarized in intervening defendant's Statement of Material Facts As To Which There Is No Genuine Issue, filed today in connection with its Motion for Summary Judgment.

Respectfully submitted,

W. GRAHAM CLAYTOR, JR.,
701 Union Trust Building,
Washington 5, D. C.

MALCOLM L. MONROE,
1424 Whitney Building,
New Orleans 12, Louisiana.

August 13, 1962.

Filed August 22, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

[Title omitted]

RESPONSE OF DEFENDANT COMPTROLLER OF THE CURRENCY TO MOTION OF INTERVENING DEFENDANT FOR SUMMARY JUDGMENT

Comes now the defendant Comptroller of the Currency, through his undersigned counsel, and states to the Court that he has no objection to the granting of the motion of the Whitney National Bank in Jefferson Parish, Intervening defendant herein, for summary judgment. The supporting statement of material facts, filed by said intervening defendant pursuant to Local Civil Rule 9(h), is accurate and represents a fair statement of the essential facts in this case.

In addition to granting said motion, the Court should also grant the motion for summary judgment (or in the alternative the cross-motion to dismiss) filed herein by the defendant Comptroller of the Currency. The cross-motion of plaintiffs for summary judgment should be denied.

JOSEPH D. GUILFOYLE,
Acting Assistant Attorney General.

DONALD B. MACGUINEAS,
DAVID V. SEAMAN,
Attorneys, Department of Justice
Attorneys for Defendant Comptroller of the Currency.

Of Counsel:

DAVID C. ACHESON,
United States Attorney.

Filed August 22, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

[Title omitted]

RESPONSE OF DEFENDANT COMPTROLLER OF THE CURRENCY TO MOTION OF INTERVENING DEFENDANT FOR LEAVE TO AMEND ANSWER

Comes now the defendant Comptroller of the Currency, through his undersigned counsel, and states to the Court that he has no objection to the granting of the motion of the Whitney National Bank in Jefferson Parish, intervening defendant herein, for leave to file and serve a supplemental answer.

JOSEPH D. GUILFOYLE,
Acting Assistant Attorney General.

DONALD B. MACGUINEAS,
DAVID V. SEAMAN,
Attorneys, Department of Justice
Attorneys for Defendant Comptroller of the Currency.

Of Counsel:

DAVID C. ACHESON,
United States Attorney.

Filed September 4, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

[Title omitted]

MOTION OF J. W. JEANSONNE, STATE BANK COMMISSIONER OF THE STATE OF LOUISIANA TO INTERVENE AS A PLAINTIFF HEREIN.

J. W. JEANSONNE, State Bank Commissioner of the State of Louisiana, respectfully moves the Court, pursuant to Rule 24 of the Federal Rules of Civil Procedure, for leave to intervene as a plaintiff in this action in order to assert the claim for relief set forth in his proposed complaint, a copy of which is hereto attached. The grounds for this motion are:

1. The representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound, directly or indirectly, by a judgment in this action; and

2. Applicant's claim and the main action have questions of law and fact in common; and

3. The plaintiffs herein rely, as grounds for their claims, upon Title 12 U.S.C. 36(c), Louisiana Revised Statutes 6:54; Title 12 U.S.C. 1841, et seq., and Act No. 275 of the Louisiana Legislature (Regular Session, 1962), while defendant and the intervening defendant herein, as grounds for their defense in this action, contend that the aforesaid Louisiana Statutes do not apply to the proposed actions of the defendant complained of in this proceeding; or that Louisiana Act 275 of 1962 is unconstitutional and void.

By law applicant for intervention is charged with the administration and enforcement of the banking laws of the State of Louisiana, including Act No. 275 of 1962, and it is accordingly essential to applicant's just and proper administration and application of said Louisiana Statutes, insofar as they affect all banks, bank holding companies and bank holding company subsidiaries doing business in

Louisiana, or which seek to do business in Louisiana; that applicant protect and foster in this action the purpose, intent and meaning of the Louisiana Statutes, the uniform application thereof and the public policy of the State of Louisiana as enunciated therein.

4. Intervention by the applicant will not delay or prejudice the adjudication of the rights of the original parties.

Applicant for intervention has noted the pendency of defendant's motion for summary judgment and motion to dismiss the complaint herein; plaintiffs' cross-motion for summary judgment; and intervening defendant's cross-motion for summary judgment, and will, if granted leave to intervene, file his opposition to defendant's and intervening defendant's said motions and will cross-move for summary judgment in favor of himself and the plaintiffs herein.

s/ BENTLEY G. BYRNES,
Attorney for Applicant for Intervention, and Assistant Attorney General of Louisiana.

s/ EDWARD L. MERRIGAN,
Local Counsel of Record to Applicant.

August 31, 1962.

Filed September 10, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

Civil Action No. 1857-62

COMPLAINT OF INTERVENING PLAINTIFF, J. W. JEANSONNE, LOUISIANA STATE BANK COMMISSIONER

J. W. JEANSONNE, the State Bank Examiner of Louisiana, intervening plaintiff herein, as and for his Complaint, respectfully alleges:

1

Intervening plaintiff is the State Bank Commissioner of Louisiana, and as such, is the officer charged with the administration of the banking laws of the State of Louisiana, including Louisiana Revised Statutes Title 6, Section 54, and Louisiana Act 275 of 1962 which became effective as the law of the State of Louisiana on July 10, 1962.

2

Intervening plaintiff files this Complaint on his own behalf as the State Bank Commissioner of Louisiana and on behalf and for the benefit of all banks located and doing business in the State of Louisiana which are subject to the jurisdiction of the State Bank Commissioner and which are subject to the provisions, restrictions and limitations provided in 12 U.S.C. 36(c) and L.R.S. 6:54, 12 U.S.C. 1841, et seq., and Louisiana Act 275 of 1962.

3

Defendant herein is the Comptroller of the Currency, an officer of the United States Government, who maintains his office in the Treasury Department within the territorial limits of the City of Washington, District of Columbia. Intervening defendant herein, Whitney National Bank in Jefferson Parish, is, upon information and belief, a subsidiary of a so-called bank holding corporation known as and by the

name of Whitney Holding Corporation, which, in turn, is a business corporation caused to be organized by the Whitney National Bank of New Orleans pursuant to the corporation laws of Louisiana.

4

The jurisdiction of the Court over the subject matter of this Complaint is predicated upon the provisions of 28 U.S.C. 1331, this being an action arising under the laws of the United States and statutes of Louisiana enacted under and pursuant to grants of authority or jurisdiction provided by the laws of the United States, and the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs; and upon the provisions of the District of Columbia Code (1961 Edition), which give this Court jurisdiction over all cases in law or in equity between parties, any of which shall be resident or found within the District of Columbia and which involve an amount in controversy in excess of the sum referred to hereinabove; and upon Rule 24 of the Federal Rules of Civil Procedure, which extends to intervening plaintiff herein the right to intervene in this action.

5.

Heretofore and for approximately seventy-nine years, the Whitney National Bank of New Orleans has operated banking offices and facilities wholly within the City of New Orleans, Parish of Orleans, State of Louisiana; and said Bank presently conducts such operations in the Parish of Orleans under a certificate or certificates issued by the Comptroller of the Currency under the National Bank Act (12 U.S.C. 21, et seq.). The said Whitney National Bank of New Orleans is by far the largest banking institution in the City of New Orleans and the State of Louisiana, and is one of the largest banks in the entire southern portion of the United States. On June 30, 1961, the said Bank held approximately Thirty-nine (39%) percent of the total deposits in all banks in the Parish of Orleans, State of Louisiana, and Forty-four (44%) percent of all deposits of individuals, partnerships and corporations, although there are numerous other State and National Banks with offices and banking facilities in said Parish.

In addition, the said Whitney National Bank of New Orleans has also managed to accumulate and hold in its

banking facilities, located in New Orleans (Parish of Orleans), deposits of individuals, partnerships, and corporations emanating from the East Bank of the Mississippi River in Jefferson Parish, Louisiana (a Parish beyond the limits of Orleans), in an aggregate amount exceeding Thirty (30%) percent of all such deposits held by all banks having main banking offices and facilities in the same area of Jefferson Parish, Louisiana.

6

Under long standing provisions of the National Bank Act (12 U.S.C. 36(c)(e)(f)), National Banks such as Whitney National Bank, have been prohibited by law from opening branches or additional banking offices or facilities in any county, parish or state, other than that in which its main office or banking facilities are located, unless, state chartered banks are likewise specifically authorized by state law to so expand.

7

The laws of the State of Louisiana do not authorize State banks to establish, operate and expand new branch or additional banking facilities to any point within the State. On the contrary, the statutes of Louisiana (L.R.S. 6:54), as written and as historically applied by the Louisiana Bank Commissioner, expressly prohibit any bank with more than $100,000.00 capital from opening a branch or an additional banking facility in any Parish (i.e. county) beyond the Parish in which its main office is located, if another bank is already located and operating in the Parish into which the large bank would like to expand.

8

The following banks, chartered under the laws of the State of Louisiana and subject to the jurisdiction of intervening plaintiff herein, are already located and have been operating in Jefferson Parish, Louisiana, and have invested large amounts of capital in their facilities so located, in reliance upon the aforementioned provisions and protections of the law:

Metairie Savings Bank & Trust Company
Merchants Trust & Savings Bank
Metropolitan Bank of Jefferson Parish

9

Furthermore, the following banks, chartered under the laws of the State of Louisiana and subject to the jurisdiction of intervening plaintiff herein, are located in and are and have been operating in Orleans Parish (City of New Orleans), Louisiana, in direct competition with the aforementioned Whitney National Bank of New Orleans, and like Whitney, are prohibited by the said statutory prohibitions from establishing any branches or banking offices beyond the limits of Orleans Parish in Jefferson Parish, Louisiana:

The Bank of New Orleans & Trust Company
The Bank of Louisiana in New Orleans

10

Upon information and belief, in or about 1959, and with complete knowledge of the aforementioned Federal and State statutory prohibitions, Whitney National Bank of New Orleans commenced to consider ways and means whereby the prohibitions of the said Federal and State statutes might be circumvented so that Whitney National Bank of New Orleans would be able to locate, open and operate new branch or additional bank facilities beyond the limits of the Parish of Orleans and within that part of Jefferson Parish on the East bank of the Mississippi River wherein the State banks listed in Paragraph 8 hereinabove had already invested very large sums of capital and had established and were operating extensive, complete and adequate banking facilities.

11

After engaging in various ex parte conferences and meetings with the Comptroller of the Currency and various of his agents and employees, Whitney National Bank of New Orleans, upon information and belief, fashioned, adopted and executed the following corporate maneuvers in an attempt to circumvent the prohibitions of the aforementioned Federal and State statutes:

(a) Whitney National Bank caused to be organized a Louisiana corporation named "Whitney Holding Corporation". The sole initial capital investment of this corporation was $350,000.00 taken directly from the capital funds

of the Whitney National Bank. In return for this investment said Bank received Fifty-six Hundred (5600) shares of stock of Whitney Holding Corporation which were distributed to the Bank stockholders as a stock dividend.

(b) Whitney National Bank then caused to be organized a non-operating association in the City of New Orleans, Parish of Orleans, under the name "Crescent City National Bank", to which the Comptroller of the Currency issued a national banking charter with full knowledge that said Crescent City National Bank was created, not to do business as a bank but solely for the purpose of serving as a separate entity into which Whitney National Bank of New Orleans could be merged. The Whitney Holding Corporation (completely controlled by Whitney National Bank, as aforesaid) then invested the entire $350,000.00 it received from Whitney National Bank in this non-operating banking association and took in exchange therefor all of this "bank's" authorized stock.

(c) Whitney National Bank merged into the non-operating banking association, Crescent City National Bank, under the charter of said Crescent City National Bank, issuing Whitney Holding Corporation stock to the former stockholders of the Whitney National Bank and simultaneously changing the name of said bank from Crescent City National Bank to the original name Whitney National Bank of New Orleans, the result of such corporate maneuvers being that the Whitney Holding Corporation owned all of the stock in the merged Whitney National Bank, and the shareholders of the former Whitney National Bank of New Orleans owned all of the stock in the Whitney Holding Corporation.

(d) Whitney National Bank of New Orleans then provided $650,000.00 of its capital funds to the Whitney Holding Corporation, which funds were to be employed by Whitney Holding Corporation to create a branch bank in Jefferson Parish, Louisiana under the name Whitney National Bank in Jefferson Parish. All stock in the branch bank, so organized, was issued to Whitney Holding Corporation and Whitney National Bank in Jefferson Parish was then to commence business in Jefferson Parish with $650,000.00, in capital supplied directly by Whitney National Bank in New Orleans, thereby completely circumventing and evading the prohibiting statutes.

12

The aforementioned plan for circumvention of Federal and State banking laws and of the said proposal to commence a banking business in Jefferson Parish, Louisiana were not only in direct violation of the letter and intent of 12 U.S.C. 36 and Louisiana Revised Statutes 6:54, but were also in violation of the Federal Bank Holding Company Act (12 U.S.C. 1841, et seq.) and more particularly 12 U.S.C. 1845, 1846 and Louisiana Act No. 275 of 1962, which became effective on July 10, 1962.

13

In spite of the foregoing, the defendant, Comptroller of the Currency, without holding hearings and in the face of the aforementioned prohibitions of both Federal and State law, nevertheless approved the organization of the non-operating bank, Crescent City National Bank with capital funds supplied by the Whitney National Bank of New Orleans, the merger of Whitney National Bank of New Orleans into this non-operating bank; and the proposed branch operations of Whitney National Bank in Jefferson Parish under the name Whitney National Bank in Jefferson Parish. Notwithstanding the fact that the defendant, Comptroller of the Currency, well knew that the only reason for the intricate corporate maneuvers of Whitney National Bank were to enable it to expand its operations into Jefferson Parish, he is presently asserting that if this Honorable Court dissolves the injunction entered by Judge Holtzoff on July 10, 1962, he will immediately issue a certificate authorizing intervening defendant to conduct banking operations in Jefferson Parish, and has, in fact, filed an affidavit herein under date of August 9, 1962 wherein he states:

> "5. On July 10, 1962, the Governor of the State of Louisiana approved Act No. 275, entitled 'An Act to define the bank holding Company,' to prohibit the formation of new bank holding companies, and to control the future expansion of existing bank holding companies and of their subsidiaries.
>
> "6. Upon consideration of these subsequent developments, and after careful examination of the Louisiana statute, I have concluded that there has occurred no reason to alter the Comptroller's prior determination

that a certificate of authority should be issued to Whitney National Bank in Jefferson Parish, pursuant to 12 U.S.C. Section 27.

"7. Accordingly, if the preliminary injunction entered herein is vacated, and if the Whitney National Bank in Jefferson Parish so requests . . . it is my present intention to issue such certificate."

14

Moreover, the intervening defendant herein, while admitting that it is a subsidiary of a bank holding company within the definitions contained in both the aforementioned Federal Bank Holding Company Act and Louisiana Act No. 275 of 1962, alleges in this action in its proposed Supplemental Answer:

"V. Intervening Defendant avers that Act 275 furnishes no basis for granting the plaintiffs' request for declaratory relief or for an injunction . . . because Act 275 does not apply to the Comptroller of the Currency or to a national bank such as Whitney National Bank in Jefferson Parish.

"VI. Intervening Defendant further avers that Act 275, if applicable, violates the Statutes and Constitution of the United States.

"Wherefore . . . Intervening Defendant prays that this Court enter a judgment declaring that Louisiana Act 275 of 1962 does not apply to either the Defendant Comptroller or the Intervening Defendant. In the alternative, Intervening Defendant further prays for a judgment declaring that the said Act 275 is unconstitutional and void."

15

Intervening Plaintiff, charged as aforesaid with the administration of the banking laws of Louisiana, including Act 275 of 1962, and with the supervision and control of banks, bank holding companies and their subsidiaries in Louisiana, and with the protection of all banks doing business in Louisiana under the laws of Louisiana against unlawful and improper bank establishments and operations, respectfully asserts and alleges:

(a) Defendant Comptroller is without authority to issue any certificate to intervening defendant herein, authorizing it to open and operate banking offices in Louisiana in violation of Federal and State statutory prohibitions;

(b) Intervening defendant herein, like all banks and bank holding company subsidiaries proposing to do business in Louisiana, is subject to the prohibitions of 12 U.S.C. 36(c), Louisiana Revised Statutes 6:54, 12 U.S.C. 1841, et seq., and Louisiana Act 275 of 1962, and is accordingly prohibited from opening and operating banking offices in Jefferson Parish, Louisiana.

(c) Louisiana Act 275 of 1962 is a Constitutional statute, which together with 12 U.S.C. 1845, 1846 specifically prohibits intervening defendant, admittedly a subsidiary of a corporation organized under the laws of Louisiana which is subject to regulation by the State of Louisiana, from opening banking facilities in Jefferson Parish so long as more than Seventy-five (75%) percent of intervening defendant's outstanding stock is owned by a bank holding corporation.

16

Intervening plaintiff respectfully alleges further that the issuance by defendant of any certificate authorizing Whitney National Bank of New Orleans, through the device of the Whitney Holding Corporation, unlawfully to establish banking offices in Jefferson Parish, Louisiana, with funds taken directly from the Whitney National Bank of New Orleans, would cause chaos in the entire banking industry throughout the State of Louisiana, and would, contrary to the public policy of Louisiana expressed in Act 275 of 1962 and underlying L.R.S. 6:54, eliminate all effective protections historically fostered by the laws of the United States and the State of Louisiana for the growth of independent unit banks and to insure effective competition among all banking institutions. Moreover, the granting of a certificate to intervening defendant herein pursuant to any finding that 12 U.S.C. 1841, et seq. and Louisiana Act 275 of 1962, read together, do not exclude Louisiana bank holding corporations from opening bank facilities throughout Louisiana so long as the facilities are simply chartered as National banks, would place in the hands of intervening defendant and its present holding corporation concentration of control over the banking industry of Louisiana,

prohibited to all State banks, and would create means for eliminating independent unit banks and the probable monopoly control of banking in Louisiana by Whitney National Bank.

17

More specifically, with reference to Jefferson Parish, Louisiana, the granting of a certificate to intervening defendant herein would bring to bear upon all of the State banks located therein a new, destructive, unlawful competition from the combined capital resources, lending power and management of the Whitney National Bank of New Orleans, and would place in jeopardy the capital investments in said banks.

By law, the State chartered banks located in Jefferson Parish are prohibited from opening and operating branch banks in Orleans Parish, Louisiana, in competition with Whitney National Bank of New Orleans, and each is prohibited by law from creating, establishing and operating with its own capital resources a holding company system controlling bank offices in Orleans Parish or elsewhere in the State of Louisiana. Each of these banks has been established and has been operating in Jefferson Parish, Louisiana in reliance upon Federal and State statutes which prohibit other National and State banks from interfering with, damaging or impeding their banking businesses and facilities by means of unlawful expansion and encroachments.

18

The State chartered banks located in Orleans Parish, Louisiana are relatively small competitors of the Whitney National Bank of New Orleans. Many of the depositors and borrowers of each of these banks either reside in or have offices located in Jefferson Parish, Louisiana, but nevertheless maintain substantial deposits or loan accounts at the banking offices of such banks. Each of these banks is prohibited by law from expanding into Jefferson Parish by means of the establishment of branch facilities or by the device of creating a holding company through which it may simply siphon its capital funds into banking offices in Jefferson Parish or in other locates in Louisiana. If the intervening defendant were licensed to open its facilities in Jefferson Parish, Louisiana, in contravention of these same

statutory prohibitions, said defendant and Whitney National Bank of New Orleans would immediately be able to attempt to divest and appropriate to themselves substantial portions of the banking business and profits now enjoyed by the said Orleans Parish State banks from sources in Jefferson Parish, and would cause these State banks to suffer severe, irreparable damage and loss far exceeding the jurisdictional monetary limits of this Court.

19

Finally, if defendant Comptroller is permitted by this Court to ignore and avoid the prohibitions of the aforementioned Federal and State statutes, as he proposes to do in this action, there would remain no effective bar to the farther expansion of Whitney Holding Corporation through each and every Parish in the State of Louisiana, provided, in each Parish, the holding corporation expanded simply by means of the establishment of National rather than State bank facilities.

Upon information and belief, Whitney Holding Corporation was the only bank holding corporation organized and proposed to commence banking operations in the State of Louisiana on July 10, 1962, when Act No. 275 of 1962 became effective, and since said Act now prohibits "any action to be taken which results in a company or a bank becoming a bank holding company", this would place Whitney Holding Corporation and the Whitney National Bank in an absolute monopoly position in the banking industry of Louisiana, free to expand in any and every direction it chooses, while *all other State and National banks* are prohibited by law from creating Louisiana bank holding companies for any like expansion.

The granting of such power and control to the Whitney organization would necessarily subject all other banks in Louisiana to new, oppressive and unfair competition from the combined capital resources of an ever expanding bank holding company system supported and fostered by the defendant Comptroller, which even at the outset of its expansion program is the dominant banking institution in the entire State of Louisiana.

Any holding by this Court in this action that Louisiana Act No. 275 of 1962 is unconstitutional, or that said Act may not properly and effectively be applied to prevent and prohibit intervening defendant herein, a wholly owned subsidiary of a Louisiana corporation, Whitney Holding Corporation, from opening branch offices would deprive or hamper intervening plaintiff in fulfilling his official obligation to enforce equally and justly the prohibitions of this statute, and would render it impossible for the banking laws of Louisiana to be administered and applied justly, constitutionally and in accordance with the expressed public policy of the State of Louisiana and the Congress of the United States.

WHEREFORE, intervening plaintiff prays:

(a) That this Court enter judgment herein declaring that defendant, Comptroller of the Currency, is prohibited by 12 U.S.C. 36, 12 U.S.C. 1841, et seq., Louisiana Revised Statutes 6:54, and Act No. 275 of the 1962 Regular Session of the Louisiana Legislature from issuing to the Whitney National Bank of New Orleans, the Whitney Holding Corporation and/or the Whitney National Bank in Jefferson Parish a Certificate or Certificates of Authority authorizing them, or any of them, to establish, open and operate new branch bank facilities or additional banking offices or any other bank facilities in Jefferson Parish, State of Louisiana; and

(b) That this Court make permanent the preliminary injunction entered herein by this Court on July 10, 1962; and

(c) That this Court grant such other and further relief as may seem just and proper in the premises.

s/ BENTLEY G. BYRNES,
Attorney for J. W. Jeansonne, State Bank Commissioner of the State of Louisiana, and Assistant Attorney General of Louisiana.

s/ EDWARD L. MERRIGAN,
Local Counsel of Record.

Filed September 5, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

Civil Action No. 1857-62

PLAINTIFFS' OPPOSITION TO INTERVENING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND MOTION FOR LEAVE TO AMEND AND TO DEFENDANT'S MOTION TO DISMISS

Come now the plaintiffs, who oppose, on all of the grounds set forth in the papers and points and authorities in support of the Motion for Preliminary Injunction herein and in support of Plaintiffs' Cross-Motion for Summary Judgment,

(a) Defendant's Motion to Dismiss,
(b) Intervening defendant's Cross-Motion for Summary Judgment, and Motion for Leave to Amend its Answer herein.

Plaintiffs shall, in accordance with local Rule 9(h), serve and file a "Statement of Genuine Issues Which Must Be Litigated" with reference to said defendants' motions for summary judgment, and will file additional Points and Authorities in Opposition to the said Motion to Dismiss and Cross Motion for Summary Judgment as soon as the typing of same after the Labor Day holidays can be completed.

With reference to intervening defendant's motion for leave to serve and file an Amended Answer, plaintiffs will consent to such motion if defendant and intervening defendant, pursuant to Rule 15(b) of the Federal Rules of Civil Procedure, will consent (a) to an amendment of the complaint herein whereby Paragraphs 13, 20 and the Prayer for Relief thereof would be read to include Louisiana Act 275 of 1962, as one of the statutes alleged to be violated, along with the federal Bank Holding Company Act, or (b) that the issue of the alleged violation of Louisiana Act 275 of 1962 be treated "in all respects as . . . raised in the pleadings" herein.

EDWARD L. MERRIGAN,
Attorney for Plaintiffs.

Filed September 6, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

Civil Action No. 1857-62

PLAINTIFFS' "STATEMENT OF GENUINE ISSUES" IN OPPOSITION TO DEFENDANT'S AND INTERVENING DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT

In accordance with the provisions of *Rule 9(h)* of this Court's Rules, plaintiffs file the following "Statement of Genuine Issues" in opposition to the cross-motion of intervening defendant, Whitney National Bank in Jefferson Parish, for summary judgment, in which motion defendant Comptroller has concurred:

1. Plaintiffs deny that Whitney Holding Corporation is presently "duly registered under the Bank Holding Company Act of 1956, 12 U.S.C. §1841-48" as alleged in Paragraph 1 of intervening defendant's proposed statement of admitted facts. The status of Whitney Holding Corporation under said Act is the subject of incomplete litigation in the Fifth Circuit Court of Appeals under 12 U.S.C. §1848.

2. Plaintiffs deny that the withdrawal of $650,000. from the capital funds of Whitney National Bank of New Orleans for immediate transfer by Whitney Holding Corporation to Whitney National Bank in Jefferson Parish was or was intended, in form or in substance, to be a mere ordinary "dividend" to the newly created Whitney Holding Corporation, as alleged in Paragraphs "2" and "11" of the Statement of Intervening Defendant of Material Facts as to Which There Is No Genuine Issue. On the contrary, the evidence of record herein, contained wholly in defendant's own written exhibits, shows:

(i) In a letter to his shareholders, dated October 27, 1961, the President of Whitney National Bank of New Orleans, wrote to his shareholders as follows:

"We propose to put $350,000. *of the capital funds* of the Whitney National Bank into a Louisiana busi-

ness corporation under the title—"Whitney Holding Corporation" . . .

"The Crescent City National Bank (to be named Whitney National Bank of New Orleans) will provide $650,000. to Whitney Holding Corporation with which Whitney Holding Corporation will cause to be created the Whitney National Bank in Jefferson Parish. . . .

(ii) In Exhibit K to its application to the Federal Reserve Board, signed by Whitney Holding Corporation, the following admission appears:

"*Financial Condition of Applicant*—Applicant will own all of the outstanding shares of the Whitney National Bank of New Orleans and the proposed Jefferson Parish Bank, and contemplates no other financing. Any additional cash needed will be obtained from the undivided profits of the operating banks."

(iii) In his testimony before the Federal Reserve Board on January 17, 1962, Mr. Keehn Berry, President, Whitney National Bank of New Orleans, testified as follows (*Defendant's Ex. 4, page 13*):

"The Whitney National Bank of New Orleans will continue in exactly the same form as it is now *except for the withdrawal of $650,000. in capital funds which will be put into the Jefferson Parish unit as capital for it.*"

(iv) In testimony before the Federal Reserve Board on January 17, 1962, Clem H. Sehrt, attorney for minority stockholders in the Whitney National Bank of New Orleans, stated (*Defendant's Ex. 4, pages 42, 46*):

"It (Whitney Holding) exists how? It exists by virtue of the funds supplied to it by Whitney National. . . .

"But if it is all accomplished, they dip in and create a Jefferson Parish bank . . . for operation with Whitney funds."

Thus, as alleged in support of plaintiffs' motion for summary judgment, *and as proved by defendant's own testimony and exhibits*, the aforementioned $350,000. and $650,000. withdrawals from the capital funds of Whitney National

Bank of New Orleans were, in fact, and were intended to be nothing but the siphoning off of capital from Whitney National Bank of New Orleans for immediate transfer to the capital of the new branch of that bank, the intervening defendant herein.

3. There is no evidence of record and plaintiffs accordingly deny that Whitney National Bank in Jefferson Parish became a "national banking association on May 11, 1962", as alleged in Paragraph 9 of intervening defendant's statement of allegedly conceded material facts. Plaintiffs likewise deny the facts and conclusions drawn by defendant in said Paragraph 9 from two letters not in evidence herein.

4. Plaintiffs deny the statement contained in Paragraph 10 of intervening defendant's proposed statement of noncontroverted facts that "there were no dissenting shareholders". The evidence of record herein is to the contrary, as follows:

In his testimony before the Federal Reserve Board on January 17, 1962, Mr. Keehn Berry, President of Whitney National Bank of New Orleans, testified (*Defendant's Ex. 4, pages 10, 11*):

> "On the recommendation of the Comptroller, we proceeded with our stockholders' meeting submitting to stockholders our entire program and the reason for it.
>
> "On November 29th, last year, our stockholders met. We had 105,824 shares out of 112,000 outstanding represented at the meeting; 93,645 shares voted in favor of the program-*and 12,145 shares voted against it.*"

Representatives of *dissenting shareholders* of Whitney National Bank of New Orleans appeared before the Federal Reserve Board in January, 1962 to oppose the proposals (*Defendant's Ex. 4, pages 25-47*):

Furthermore, the aforesaid statement in Paragraph 10 of the proposed statement of conceded facts is made in the face of the affidavit of E. A. Waffenschmidt, Cashier and Assistant Vice President of Whitney National Bank of New Orleans, filed herein by intervening defendant under date of August 3, 1962. Attached to that affidavit is a sheet entitled "Tabulation of Vote", certified by Judges of Election. This Tabulation, on file in this action shows, that *5,002 shares* of stock were voted *in person against* the proposed plan here in litigation, while *7,143 shares voted against same*

by proxy. A copy of said Tabulation Sheet is annexed hereto for the Court's convenience.

5. Plaintiffs deny, *by reason of complete lack of any admissible evidence herein*, that on *May 18, 1962*, "the shareholders of the old Whitney National Bank of New Orleans exchanged their shares of stock for stock of Whitney Holding Corporation"; and that on *May 18, 1962*, "the former shareholders of the old Whitney National Bank of New Orleans owned all of the stock of Whitney Holding Corporation which in turn owned all of the stock . . . of the new Whitney National Bank of New Orleans . . . and of the newly organized Whitney National Bank in Jefferson Parish", all as alleged in *Paragraph 10* of intervening defendant's proposed statement of material facts alleged not to be in issue.

The mere hearsay affidavit of James J. Saxon, dated June 20, 1962, relied upon by intervening defendant in support of these allegations, is *not* admissible proof of these allegations.

6. Plaintiffs deny, *for lack of any admissible evidence herein*, that "the first meeting of the stockholders of Whitney National Bank in Jefferson Parish was held on May 24, 1962"; that, on said date, "directors of the said bank were properly elected"; that, on said date, the directors "paid the price for their qualifying shares", were "sworn, qualified and (took) office as directors". For the same reason, plaintiffs deny that, on May 24, 1962, "by-laws were adopted", "officers of the bank have been elected, and stock of the Federal Reserve Bank of Atlanta in the amount of $18,000, has been subscribed and paid for by Whitney National Bank in Jefferson Parish", all as alleged in *Paragraph 12* of intervening defendant's proposed statement of material facts.

The mere hearsay affidavit of James J. Saxon, dated June 20, 1962, relied upon by intervening defendant in support of these allegations, is *not* admissible proof thereof.

Furthermore, an exhibit filed upon this motion by intervening defendant herein completely contradicts the allegations of said *Paragraph 12* of intervening defendant's statement, in that it purports to show, *under oath*, that the first meeting of the shareholders of intervening defendant occurred on May 10, 1962 and that directors were elected at that time (See *Exhibit 4*, annexed to *Gilly* affidavit of August 3, 1962, copy of which is also annexed hereto).

In addition, in *Paragraphs 10 and 11* of intervening defendant's proposed statement of conceded facts, it is alleged, contrary to said *Exhibit 4*, that Whitney Holding Corporation did not become the owner of "all the stock . . . of the newly organized Whitney National Bank in Jefferson Parish" until on or after *May 18, 1962*. Furthermore, in *Paragraph 12* of said proposed "materlal facts", it is alleged that the directors of intervening defendant did not pay "the purchase price for their qualifying shares" until on or after May 24, 1962.

For all of these reasons, it is submitted that intervening defendant's Rule 9(h) Statement refers not only to facts "in issue" herein, but to facts which are incorrect and untrue under said defendant's own sworn written exhibits herein.

7. Plaintiffs deny that "the present suit was filed on June 9, 1962, *just as the Comptroller of the Currency was about to issue a Certificate of Authority* . . . permitting the Whitney National Bank in Jefferson Parish to commence banking operations", as alleged in *Paragraph 13* of intervening defendant's statement of alleged conceded material facts. On the contrary, on June 8, 1962 (and as partially conceded by defendants in *Paragraph 14* of intervening defendant's statement of alleged conceded facts), Robert Bloom, Esq., Counsel for defendant Comptroller, advised plaintiffs' counsel that since the Comptroller was not then present in Washington and since his office was not yet ready to issue the certificate herein, in any event, the Comptroller would accordingly voluntarily agree to withhold issuance of his certificate until this Court determined plaintiffs' motion for a preliminary injunction.

8. Plaintiffs deny *Paragraph 17* of intervening defendant's proposed statement of conceded material facts, and state that the allegations contained therein are patently untrue and groundless, particularly that portion thereof which states "Had it not been for the institution of these proceedings on June 9, 1962 . . . the Whitney National Bank in Jefferson Parish (would have commenced) banking operations on or about that date and such banking operations would in fact have been commenced at that time".

Annexed hereto, for the convenience of the Court, is an affidavit made on July 3, 1962 in New Orleans, Louisiana by

Leon M. Trice, a commercial photographer in that city for 40 years, together with photographs taken by him on *July 3, 1962, almost one month after June 9, 1962*, showing

(a) the proposed location at 4407 Jefferson Highway of the intervening defendant's alleged temporary office. On that date, it was a self service "Washateria"; and

(b) the proposed location, across the highway, where the intervening defendant allegedly intends to construct a permanent office. It was, on July 3, 1962, still represented as the "Royal Tourist Court". A "For Sale" sign clearly appears on the property in front.

Moreover, by affidavit dated June 16, 1962 on file herein, James J. Gilly, President of intervening defendant herein, swore that the lease on the premises at No. 4407 Jefferson Highway was not even scheduled to become effective until *June 15, 1962*, i.e., after June 9, 1962, the date upon which this action was commenced. A copy of said lease submitted to the Court by intervening defendant is likewise annexed hereto *in support of plaintiffs' objections* to said defendant's alleged "material facts as to which there are no issue".

9. Plaintiffs deny the allegations contained in *Paragraph 8* of intervening defendant's proposed conceded facts for the same reasons, and on the basis of the same evidence hereto annexed.

10. Plaintiffs deny the allegations contained in *Paragraph 7* of intervening defendant's statement to the extent that same imply plaintiffs' agreement that the Federal Reserve Board scheduled and held in Louisiana the normal or regular statutory public hearing provided for in *12 U.S.C. §1842*, and to the extent same imply that plaintiffs had actual notice of the informal hearing conducted by said Board in Washington, D. C. in January, 1962. Furthermore, plaintiffs did apply to said Board for further hearings and reconsideration of the application of Whitney Holding Corporation, but said application was denied without hearing.

WHEREFORE, plaintiffs submit that substantial genuine issues exist with reference to the material facts relied upon by defendant and intervening defendant in support of their

respective motion and cross-motion for summary judgment herein, and that same must accordingly be denied. Simultaneously, however, there are herein facts as to which no genuine issues exist which direct that plaintiffs' motion for summary judgment be granted, and plaintiffs pray once again that such judgment be granted and entered herein.

EDWARD L. MERRIGAN,
Attorney for Plaintiffs.

Filed September 6, 1962

EXHIBIT "O"

PLAINTIFFS' EXHIBITS

PLYMOUTH CORDAGE COMPANY
Established 1824
Southern District Office: 600 St. George Avenue.
P.O. Box 10215,
New Orleans 21, Louisiana

12 July 1961.

Whitney National Bank,
Main Office,
New Orleans, Louisiana.

Attention: Mr. Morgan Whitney

Gentlemen:

I understand that you are contemplating the establishment of a branch bank to be located in the vicinity of Jefferson Highway.

At present we are carrying our pay roll account with your branch at Carrollton and Oak. Our subsidiary company, Cordage Sales Company, Inc. has its regular account with your main branch downtown.

My personal account is with your main branch, although I did open a small account with National Bank of Commerce in Jefferson Parish, when they opened on Jefferson Highway. This was purely for the convenience of location to my office.

While I cannot speak for our management at Plymouth,

I can definitely state that a branch of your institution located on Jefferson Highway would mean a great deal to us all in the convenience of handling our accounts.

I shall continue in my efforts to increase our activity with the Whitney, and your contemplated new office should certainly strengthen your sales effort with our management to secure a greater portion of our New Orleans business.

Sincerely yours,

PLYMOUTH CORDAGE COMPANY,
C. H. BABINGTON,
Southern District Manager.

CHB/mo

Filed September 6, 1962

EXHIBIT "P"

CHARLES DENNERY, INC.
Established 1894
P. O. Box 10094
New Orleans 21, Louisiana

July 12, 1961.

Whitney National Bank of New Orleans,
Mr. K. Berry, President,
New Orleans, Louisiana

Dear Sir:

It would be a distinct advantage to us to have a banking institution established in the Parish of Jefferson, with banking facilities and service such as the Whitney National Bank of New Orleans renders.

Sincerely,

CHARLES DENNERY, INC.
GEORGE LE BEAU,
Treasurer.

GL:jd

Filed September 6, 1962

EXHIBIT "Q"

O. E. ALEXANDER, JR.
3600 James Drive
Metairie, Louisiana

July 12, 1961.

Dear Mr. Carpenter:

I was indeed pleased to hear of the Whitney National Bank's plans for expansion, which possibly might include a Branch located somewhere on Jefferson Highway.

Of course, this would make it very convenient [illegible]me and certainly I feel it would be convenient for people residing in this area, either on a personal or business basis, to be able to do their banking in a facility that is located much closer to the area instead of having to do their banking on the basis of going downtown each time.

I would certainly like to see such an expansion program take place on the part of Whitney National Bank.

Yours very truly,

O. E. ALEXANDER, JR.

MR. WM. A. CARPENTER,
Vice President
Whitney National Bank of New Orleans,
New Orleans, Louisiana.

Filed September 6, 1962

EXHIBIT "R"

RAUSCH NAVAL STORES CO.,
Incorporated
Manufacturers Dealers and Exporters
Turpentine, Rosin, Pine Tar, Navy Pitch
New Orleans, U.S.A.

July 12, 1961.

Whitney National Bank of New Orleans
St. Charles & Gravier Streets,
New Orleans, Louisiana.

Attention: Mr. J. W. Berry, *President*

Gentlemen:

We have for many years enjoyed and taken pride in our banking association with the Whitney National Bank of New Orleans.

Formerly our offices were located in the business section of New Orleans; however, it was elected that for the purpose of achievement and advancement of the corporation, it was necessary for us to combine the office with warehouse operations. Such move was accomplished, which has resulted in our steady and continued growth.

It was very difficult to obtain sufficient property in Orleans Parish to care for our expansion program which resulted in our location in Jefferson Parish some twelve years ago.

You are quite cognizant that some 85% of our business sales are for foreign consumption. Because of the nature of our business it is most necessary we are in close contact with the Whitney National Bank for discussion of finance, credit letters, conditions in countries where we sell our materials, as well as customers involved—all of which consumes much time and effort in our organization and certainly, we know consumes your valuable time.

It is a well known fact that many other firms have located in the East bank area of Jefferson Parish, which has assisted greatly in its phenomenal growth. With this in mind,

we place before you for your consideration the possibility of your establishing a branch bank in this area, which we feel would be a distinct advantage and convenience to the many firms that depend on the banking facilities of the Whitney.

Yours very truly,

RAUSCH NAVAL STORES CO. INC.
WILLIAM W. RAUSCH,
Vice President.

WWR er

Filed September 6, 1962

EXHIBIT "T"

BOYCE MACHINERY CORPORATION
7330 Florida Street,
P. O. Box 1308,
Baton Rouge, Louisiana,
Wa 1-8131

12 July 1961.

Mr. James Gilly, Jr.,
Whitney National Bank,
New Orleans, Louisiana.

Dear Mr. Gilly:

I understand your bank is considering the formation of a new bank to be located in Jefferson Parish. This certainly is good news for us. As you know, our office in the New Orleans area is located in Jefferson Parish and, since the major portion of our banking is done with your firm, this new facility would certainly make it much more convenient for us to continue our relationship with you.

Needless to say, should your bank move into Jefferson Parish, a great number of our employees in that area would take advantage of your services.

Again, let us congratulate you upon hearing this news.

Yours very truly,

STATEN H. WILSFORD,
Vice-President.

SHW jt

Filed September 6, 1962

EXHIBIT "U"

CRESCENT MATERIALS SERVICE, INCORPORATED
4829 Jefferson Highway,
Post Office Box 10097,
New Orleans 21, Louisiana

July 11, 1961.

Whitney National Bank of N. O.
228 St. Charles Avenue,
New Orleans 12, La.

Att.: Mr. J. P. Monroe, *Vice-President*

Gentlemen:

This company is a wholesale building material supply company doing business in the Parish of Jefferson, State of Louisiana. The nature of our business requires that we have daily banking transactions, frequently requiring several trips in a day.

The purpose of this letter is to request that the Whitney Bank consider the establishment of a banking facility in Jefferson Parish. The establishment of a Branch in this area would certainly be of great assistance to long time accounts such as ourselves and we believe would benefit the Bank.

Your consideration of this matter will be greatly appreciated.

Yours very truly,

CRESCENT MATERIALS SERVICE, INC.
C. O. LYLE, JR.,
President.

COL/m

Filed September 6, 1962

EXHIBIT "V-1"

Form F.R. Y-1

EXHIBIT F

Statutory Factors

1. *History:*

Applicant is a proposed new corporation created for the sole purpose of holding all of the stock (except directors' qualifying shares) of the present Whitney National Bank of New Orleans. The plans by which that ownership is brought about are described in Exhibit D(3) hereof. The Whitney National Bank of New Orleans as owned by the Whitney Holding Corporation will have the 43 million of capital, surplus and undivided profits as appears in the present Whitney National Bank statement. Its financial history appears in Exhibit M, having been established in 1883 and having served the New Orleans community faithfully and continuously since that date. The directors and officers of the Crescent City National Bank (to be named immediately Whitney National Bank of New Orleans) will be the same as those now serving the present Whitney National Bank.

2. *Prospects:*

The prospects of the present Whitney National Bank of New Orleans are reflected in the earnings figures given in Exhibit M-3 hereof. It will continue to serve the Parish of Orleans, which coincides with the City of New Orleans, as it has in the past with no presently contemplated change in its facilities.

The proposed new Whitney National Bank in Jefferson Parish which Applicant asks permission of the Federal Reserve Board to create and acquire will be provided with initial capital, surplus and undivided profits of $650,000.00. As explained elsewhere this cash will be derived from Whitney National Bank of New Orleans.

Filed September 6, 1962

EXHIBIT "V-2"

Form F.R. Y-1

EXHIBIT K

Financial Condition of Applicant

Applicant will own all of the outstanding shares of the Whitney National Bank of New Orleans and the proposed Jefferson Parish Bank, and contemplates no other financing. Any additional cash needed will be obtained from the undivided profits of the operating banks.

Attached is a pro forma balance sheet of the applicant as of the completion of the program permission for which is hereby requested, but based on figures of June 30, 1961. (Exhibit K-1)

EXHIBIT L

Financial History of Applicant

None—See Exhibit M

EXHIBIT M

Financial Condition and History of the Subsidiary Banks

Information with respect to the financial condition and history of each of the Subsidiary Banks, as follows:

1. Crescent City National Bank (to be immediately named Whitney National Bank of New Orleans) and Whitney National Bank in Jefferson Parish have no financial history. We are therefore attaching information concerning the present Whitney National Bank of New Orleans as follows:
   (a) The published reports of conditions of the Whitney National Bank of New Orleans for the past 5 years marked Exhibits M-2-A, M-2-B, M-2-C, M-2-D and M-2-E.
   (b) A summary analysis of surplus and undivided profits, and of each reserve account included as a part of capital structure in reports of conditions for the past 5 years, marked Exhibit M-3.

(c) A summary analysis of each general or unallocated valuation reserve account applicable to the loan account or the securities account for the past 5 years, marked Exhibit M4.

Filed September 6, 1962

EXHIBIT "V-3"

Statement of Whitney Holding Corporation

(Pro Forma)

	Assets	
Investments		
112,000	shares Capital Stock ($25 Par Value) Whitney National Bank of New Orleans	$42,380,000 00
20,000	shares Capital Stock ($25 Par Value) Whitney National Bank in Jefferson Parish	650,000 00
		$43,030,000 00
	Liabilities	
Liabilities		None
Capital		
1,120,000	shares (no par value) Common Stock	$43,030,000 00
		$43,030,000 00

Filed September 6, 1962

EXHIBIT "V-4"

WHITNEY NATIONAL BANK OF NEW ORLEANS

Established 1883

Condensed Statement of Condition as of December 30, 1960

Resources		
Cash and Due from Banks		$112,953,707.18
U. S. Government Obligations		135,142,754.47
State, Municipal and Other Public Bonds		7,221,853.55
Other Bonds and Securities		956,832.20
Loans and Discounts		206,385,793.69
Bank Premises		7,638,074.58
Other Real Estate		116,451.53
Customers' Liability Account of Acceptances		544,007.04
Accrued Income and Other Assets		2,082,898.49
Total		$473,042,372.73
Liabilities		
Deposits		$425,416,754.30
Acceptances		562,058.54
Dividend Payable January 3, 1961		112,000.00
Reserve for Taxes, Accrued Interest and Expenses		5,101,871.58
Other Liabilities		105,635.87
Capital Stock	$ 2,800,000.00	
Surplus	27,200,000.00	
Undivided Profits	11,744,052.44	
		41,744,052.44
Total		$473,042,372.73

Member of The Federal Deposit Insurance Corporation.

Filed September 6, 1962

EXHIBIT "V-5"

WHITNEY NATIONAL BANK OF NEW ORLEANS

Established 1883

Condensed Statement of Condition, December 31, 1959

Resources		
Cash and Due from Banks		$114,377,942 65
U. S. Government Obligations		112,458,847 04
State, Municipal and Other Public Bonds		10,253,172 02
Other Bonds and Securities		956,974 71
Loans and Discounts		213,264,134 38
Bank Premises		6,334,829 55
Other Real Estate		39 00
Customers' Liability Account of Acceptances		840,645 97
Accrued Income and Other Assets		2,177,946 43
Total		$460,664,531 75
Liabilities		
Deposits		$418,309,507 79
Acceptances		996,932 83
Dividend Payable January 2, 1960		112,000 00
Reserve for Taxes, Accrued Interest and Expenses		2,410,014 74
Other Liabilities		101,422 17
Capital Stock	$ 2,800,000 00	
Surplus	27,200,000 00	
Undivided Profits	8,734,654 22	
		38,734,654 22
Total		$460,664,531 75

Depositary of the United States Government, State of Louisiana and City of New Orleans. Member of the Federal Deposit Insurance Corporation.

Filed September 6, 1962

EXHIBIT "V-6"

WHITNEY NATIONAL BANK OF NEW ORLEANS

Established 1883

Condensed Statement of Condition, December 31, 1958

Resources		
Cash and Due from Banks		$107,759,789 32
U. S. Government Obligations		148,776,471 16
State, Municipal and Other Public Bonds		12,557,259 86
Other Bonds and Securities		956,962 12
Loans and Discounts		190,338,206 50
Bank Premises		4,428,834 98
Other Real Estate		39 00
Customers' Liability Account of Acceptances		1,074,881 46
Accrued Income and Other Assets		2,470,716 61
Total		$468,363,161 01
Liabilities		
Deposits		$427,327,009 39
Acceptances		1,111,956 96
Dividend Payable January 2, 1959		112,000 00
Reserve for Taxes, Accrued Interest and Expenses		3,750,096 05
Other Liabilities		93,998 87
Capital Stock	$ 2,800,000 00	
Surplus	27,200,000 00	
Undivided Profits	5,968,099 74	
		35,968,099 74
Total		$468,363,161 01

Depositary of the United States Government, State of Louisiana and City of New Orleans. Member of the Federal Deposit Insurance Corporation.

Filed September 6, 1962

EXHIBIT "V-7"

WHITNEY NATIONAL BANK OF NEW ORLEANS

Established 1883

Condensed Statement of Condition, December 31, 1957

Resources		
Cash and Due from Banks		$111,281,163.06
U. S. Government Obligations		110,181,533.56
State, Municipal and Other Public Bonds		21,192,310.24
Other Bonds and Securities		839,461.97
Loans and Discounts		201,865,728.87
Bank Premises		4,022,982.10
Other Real Estate		40.00
Customers' Liability Account of Acceptances		1,056,415.01
Accrued Income and Other Assets		1,889,097.30
Total		$452,328,732.11
Liabilities		
Deposits		$413,075,521.96
Acceptances		1,232,127.14
Dividend Payable January 2, 1958		112,000.00
Reserve for Taxes, Accrued Interest and Expenses		4,177,866.70
Other Liabilities		90,001.19
Capital Stock	$ 2,800,000.00	
Surplus	22,200,000.00	
Undivided Profits	8,641,215.12	
		33,641,215.12
Total		$452,328,732.11

Depositary of the United States Government, State of Louisiana and City of New Orleans. Member of the Federal Deposit Insurance Corporation.

Filed September 6, 1962

EXHIBIT "V-8"

WHITNEY NATIONAL BANK OF NEW ORLEANS

Established 1883

Condensed Statement of Condition, December 31, 1956

Resources		
Cash and Due from Banks		$116,856,122 41
U. S. Government Obligations		128,625,082 70
State, Municipal and Other Public Bonds		22,160,659 38
Other Bonds and Securities		839,416 65
Loans and Discounts		195,241,760 64
Bank Premises		3,870,212 15
Other Real Estate		128,571 71
Customers' Liability Account of Acceptances		1,324,989 27
Accrued Income and Other Assets		1,604,526 60
Total		$470,651,341 51
Liabilities		
Deposits		$434,498,871 03
Acceptances		1,572,644 55
Dividend Payable January 2, 1957		112,000 00
Reserve for Taxes, Accrued Interest and Expenses		3,145,114 82
Other Liabilities		81,266 52
Capital Stock	$ 2,800,000 00	
Surplus	22,200,000 00	
Undivided Profits	6,241,444 59	
		31,241,444 59
Total		$470,651,341 51

Depositary of the United States Government, State of Louisiana and City of New Orleans. Member of the Federal Deposit Insurance Corporation.

Filed September 6, 1962

EXHIBIT "W"

WHITNEY NATIONAL BANK
of New Orleans 10

June 28, 1961.

Keehn W. Berry
President

The Honorable Ray M. Gidney,
Comptroller of the Currency,
3122 Treasury Building,
Washington 25, D. C.

Dear Mr. Gidney:

We are now attaching the following:

1. An application to organize the Crescent City National Bank.
2. An application to organize Whitney National Bank in Jefferson Parish.
3. An application for approval to consolidate the Crescent City National Bank with the present Whitney National Bank of New Orleans.

These applications form part of an overall plan for the operation in the Parish of Orleans and in the Parish of Jefferson of the Whitney organization in holding company form.

As we have explained to you, we plan to form the Whitney Holding Corporation and to distribute the stock of this corporation to our shareholders as a dividend, in the proportion of 1/20 of 1 share of the corporation for every outstanding share of Whitney National Bank. The Whitney corporation will then acquire all of the stock of the newly organized Crescent City National Bank, into which the present Whitney National Bank will be consolidated, in accordance with law, by the vote of ⅔rds of the stock holders, pursuant to an agreement under which the present Whitney stockholders will surrender their stock and receive 9 and 19/20 shares of Whitney corporation stock for each share of Whitney Bank stock presently outstanding.

The Whitney corporation will at the same time acquire all of the stock of the newly formed Whitney National Bank in Jefferson Parish.

The details of this program are set out in full in the applications attached and in the exhibits attached thereto.

In accordance with our understanding with you, we are filing an application promptly with the Federal Reserve Board for approval of the Whitney Holding Corporation to become a bank holding company in accordance with law. We understand that approval of the applications attached hereto will be subject to approval of the application with the Federal Reserve Board referred to.

If any further information is desired, please let us know.

Sincerely yours,

K. W. BERRY
President.

KWB-F.

Filed September 6, 1962

EXHIBIT "X-1"

WHITNEY NATIONAL BANK
of New Orleans 10

June 28, 1961.

Keehn W. Berry
President

The Honorable Ray M. Gidney,
Comptroller of the Currency,
3122 Treasury Building,
Washington 25, D. C.

Dear Mr. Gidney:

Under cover of this letter we are sending you an application to organize a National Bank in Jefferson Parish, Louisiana. As you are undoubtedly aware, industrial sites on the Mississippi River above the City of New Orleans are being developed at a very rapid rate. This area gives promise of becoming one of the nation's most productive manufacturing centers because of its inherent advantages in the form of abundant water, gas, oil, sulphur, and lime and

its favorable location in terms of water and land transportation.

Many of the companies which have undertaken activities on this stretch of the river upstream from us are already our customers, some of them for many years. Since 1947, two state banks and one national bank have been organized in the East Bank portion of Jefferson Parish and one national bank with its home office in Gretna on the West Bank of the Mississippi has located a branch on the East Bank. In fact, these new banks have interposed themselves between our offices in Orleans Parish and our up-river business in the adjoining Parish of Jefferson.

Our proposal, in view of this situation, is to obtain permission to organize a national bank under the name "Whitney National Bank of Jefferson Parish". We are prepared, initially to establish a main office and one branch in the areas of Jefferson Parish indicated on the map enclosed with our application. It is felt that a move of this sort should be marked with decision and for that reason we should like to start with two offices.

As the result of our extensive remodeling of our quarters in New Orleans we have surplus bank furniture and equipment which could be made available to the proposed bank. We envision utilizing rental property which could be attractively designed to meet immediate requirements. Then, as business patterns clarify, we would undertake more substantial arrangements.

Filed September 6, 1962

EXHIBIT "X-2"

WHITNEY NATIONAL BANK
of New Orleans 10, La.

June 28, 1961.

The Honorable Ray M. Gidney,
Comptroller of the Currency,
3122 Treasury Building,
Washington 25, D. C.

Page #2

In order to give you, as quickly as possible, the sort of supporting information we feel you may want in connection with this application, we are submitting certain data with

your Form 1955. We respectfully ask for your favorable consideration of this application and stand ready to furnish whatever assistance you may require.

Sincerely yours,

K. W. BERRY
President.

KWB-F.

Filed September 6, 1962

EXHIBIT "Y"

Application is hereby also made on behalf of such Resulting Bank to the Comptroller of the Currency, pursuant to Section 5155 of the United States Revised Statutes, for permission to establish branches at the following locations now occupied by the head office and branches, or to be occupied by approved branches of

Whitney National Bank of New Orleans:

Popular Name and Location of Proposed Branches	Date Established	Population of City, Town or Village

Following branches of present Whitney National Bank of New Orleans:

Poydras Branch, established 1920
City Bank Branch, established 1919
Morgan State Branch, established 1911
French Market Branch, established 1919
St. Charles Avenue Branch—formerly Margaret Place Branch, established 1924
Carrollton Branch, established 1908
Broad Street Branch, established 1927
Gentilly Branch, established 1958
St. Roch Branch, established 1927
Third District Branch, established 1913, and Algiers Branch, established 1930

There are also attached, and made a part of this application, a copy of the agreement between the participating banks relating to the proposal which provides the basis of this application and supplementary documents, statements, schedules, and exhibits relative to the factors which the Comptroller of the Currency and other Federal agencies are required to consider under the provisions of applicable statutes.

Summarize the basic reasons and the negotiations which led to the filing of this application and explain fully the extent of common ownership or management of the

The Whitney National Bank of New Orleans is limited in its establishment of branches to the Parish of Orleans, the boundaries of which conform to those of the City of New Orleans. The city has grown and spread over the city boundaries into Jefferson Parish and to a lesser degree St. Bernard Parish. Old customers of Whitney National Bank have established new plants and places of business beyond the city limits and likewise individual accounts are influenced by the fact that the customer has moved beyond the city limits. Whitney National Bank therefore proposes to set up a holding company subject to the approval of the proper authorities, and in order that there be no conflicts of interest between the city units and the Jefferson Parish units it proposes by this

consolidation to place 100% of Whitney National Bank of New Orleans stock and 100% of Whitney National Bank of Jefferson Parish into that holding company. Further details of plans of procedure appear on the following page

K. W. Berry, President, Whitney National Bank of New Orleans
(Name) (Title)

529-7272 (New Orleans)
(Telephone No.)

It is understood that the cost of any necessary examination or investigation in relation to this application will be borne by:

Whitney National Bank of New Orleans
(Name of Bank)

Applicants

The applicants hereby represent that the information contained in this application is true and complete to the best of their knowledge and belief.

Whitney National Bank of New Orleans By
(Name of Bank) (Authorized Officer)

Crescent City National Bank By
(Name of Bank) (Authorized Officer)

Filed September 7, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

[Title omitted]

STIPULATION

It is hereby stipulated by and between the parties hereto that:

(1) The motion to dismiss filed herein on August 10, 1962, and the motion for summary judgment filed herein on July 11, 1962, by defendant James J. Saxon, Comptroller of the Currency, and the motion for summary judgment filed herein on August 13, 1962, by intervening defendant Whitney National Bank in Jefferson Parish, shall be treated in all respects as motions to dismiss and for summary judgment, respectively, against intervening plaintiff J. W. Jeansonne, Louisiana State Bank

Commissioner, as well as against the other plaintiffs in this action.

(2) Intervening plaintiff J. W. Jeansonne, Louisiana State Bank Commissioner, shall, if he so elects be deemed in all respects to have joined in the cross-motion for summary judgment filed herein by other plaintiffs on July 24, 1962, in all points and authorities filed in support of such motion, and in all points and authorities filed in opposition to pending motions filed by defendants.

(3) The issue of the alleged violation of Louisiana Act 275 of 1962 is to be treated in all respects as raised in the pleadings herein.

_____,
Attorney for Plaintiffs.

_____,
Attorney for Defendant,
James J. Saxon,
Comptroller of the Currency.

_____,
Attorney for Intervening Defendant,
Whitney National Bank in Jefferson Parish.

September 7, 1962.

Filed September 7, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

[Title omitted]

ORDER ALLOWING STATE BANK COMMISSIONER TO INTERVENE AS A PLAINTIFF

A motion having been filed by J. W. Jeansonne, State Bank Commissioner of the State of Louisiana, for leave to intervene as a plaintiff in this action, and all parties having consented to the granting of this motion, it is hereby

Ordered that the said J. W. JEANSONNE, State Bank Commissioner of the State of Louisiana, have leave to intervene in this cause and that he be and hereby is made an additional party plaintiff herein, and it is

Further Ordered that the Complaint of such intervening plaintiff, presently attached as an exhibit to the motion for intervention, may be filed in the Clerk's office in the same manner and with the same effect as if such intervening plaintiff had been named as an original party to this cause, and it is

Further Ordered that the caption of this action shall hereafter read as follows:

BANK OF NEW ORLEANS AND TRUST COMPANY, GUARANTY BANK AND TRUST COMPANY, *Plaintiffs*,

BANK OF LOUISIANA IN NEW ORLEANS, J. W. JEANSONNE, State Bank Commissioner of the State of Louisiana, *Intervening Plaintiffs*,

v.

JAMES J. SAXON, Comptroller of the Currency, *Defendant*,

WHITNEY NATIONAL BANK IN JEFFERSON PARISH, *Intervening Defendant*.

Done this — day of September, 1962.

United States District Judge.

We consent:

EDWARD L. MERRIGAN,
Attorney for Plaintiffs.

DAVID V. SEAMAN,
Attorney Department of Justice
Attorney for Defendant
Comptroller of the Currency

W. GRAHAM CLAYTOR, JR.,
Attorney for Intervening
Defendant Whitney National
Bank in Jefferson Parish.

Filed September 7, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

[Title omitted]

ORDER ALLOWING INTERVENING DEFENDANT WHITNEY NATIONAL BANK IN JEFFERSON PARISH TO SERVE AND FILE AN AMENDED ANSWER.

Intervening Defendant Whitney National Bank in Jefferson Parish having moved the Court for leave to serve and file an amended answer herein in accordance with the provisions of Rule 15(d) of the Federal Rules of Civil Procedure, it is hereby

Ordered, That the Intervening Defendant Whitney National Bank in Jefferson Parish have leave to serve and file such amended answer.

Done this ___ day of September, 1962

_____,
United States District Judge.

No Objection:

_____,
Attorney for Plaintiffs.

_____,
Attorney for Defendant,
James J. Saxon,
Comptroller of the Currency.

Filed September 14, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

[Title omitted]

SUPPLEMENTAL AFFIDAVIT IN SUPPORT OF INTERVENING DEFENDANT

STATE OF LOUISIANA,
Parish of Orleans.

Before me, the undersigned authority, personally came and appeared JAMES GILLY, JR., who, being by me duly sworn, deposes and says:

1. I am a resident of the City of New Orleans and President of the Whitney National Bank in Jefferson Parish. This Affidavit is made to supplement the Affidavit made in these proceedings on June 16, 1962, as supplemented on August 3, 1962.

2. When Whitney National Bank in Jefferson Parish (hereinafter called "Whitney-Jefferson") is in operation, it will have no officer or employee common with Whitney National Bank in New Orleans (hereinafter called "Whitney-New Orleans"), other than affiant who would be the only common officer. As disclosed in affidavit of James Gilly, Jr. dated June 16, 1962, there are four common directors.

3. Whitney-Jefferson and Whitney-New Orleans are entirely separate corporate entities, each with its own certificate of organization and approval of the Comptroller of the Currency. Whitney-Jefferson has been recognized by both the Comptroller of the Currency and the Board of Governors of the Federal Reserve System as a newly organized independent bank. Whitney-Jefferson will operate a banking house entirely separate from that of the Whitney-New Orleans.

4. Whitney-Jefferson has subscribed to three hundred sixty (360) shares of par value of the capital stock of the Federal Reserve Bank of Atlanta and paid for such stock in accordance with the provisions of Section 2 of the Fed

eral Reserve Act (12 U.S.C. Section 282). Its legal reserve will be carried in that institution and it will establish correspondent banking relations with the Whitney-New Orleans and with such other banks as may prove convenient and desirable in the operations of its business.

5. The Capital and surplus of Whitney-Jefferson is $600,000.00 and the capital and surplus of Whitney-New Orleans is $30,000,000.00 and because of the loan limit which in most cases is 10% of its capital and surplus, Whitney-Jefferson may in its discretion offer participations in loans to Whitney-New Orleans and other banks. Whitney-New Orleans in the course of its regular business participates in loans made by other banks.

6. Of the seven banks domiciled in Jefferson Parish, only one is a member of the New Orleans Clearing House Association, and that institution is an associate member. The banks in that Parish, however, avail themselves of the clearing privileges through the services of a correspondent, one of the four New Orleans banks who make up the Clearing House Association, and the Whitney-Jefferson proposes to clear through the Whitney-New Orleans.

7. Whitney-Jefferson will have its own vault and will act in accordance with established banking practices as to any cash which it considers to be excess. Whitney-Jefferson will not have as of the time of its opening a night depository, and should the use of a night depository be deemed desirable, Whitney-Jefferson would provide itself with such facilities as might be available, including the installation of a night depository in its own banking house or the rental of other facilities.

8. Whitney-Jefferson has and will maintain its own books of account and its own stationery, checks and forms, none of which mention Whitney-New Orleans.

9. No customer of Whitney-Jefferson will have a contractual right to make deposits at Whitney-New Orleans to be credited to his account at Whitney-Jefferson. It is, however, normal banking practice in instances where deemed desirable, for an independent bank to take a deposit from one of its customers and remit it to another bank designated by the customer for the customer's account. Whitney-Jefferson will expect to pursue normal banking practices in this regard.

10. No customer of Whitney-Jefferson will have a contractual right to withdraw funds at Whitney-New Orleans

to be charged to his account at Whitney-Jefferson. It is normal banking practice for an independent bank to cash checks drawn on other banks in instances where it feels that such action may improve the cashing bank's status in the community or may gain favor with the person cashing the check.

11. The initial meeting of shareholders of Whitney-Jefferson was held on May 10, 1962 and the Directors named in Exhibit 4 attached to the affidavit of James Gilly, Jr., dated August 3, 1962 were elected at that meeting.

12. The articles of association and certificate of organization of Whitney-Jefferson were adopted and executed on May 10, 1962 and transmitted on that date to the Comptroller of Currency. The corporate existence of Whitney-Jefferson was confirmed by letter from William B. Camp, Deputy Comptroller of Currency, dated May 11, 1962, a copy of which is annexed hereto as Whitney Exhibit 6.

13. On May 24, 1962, the aforesaid Directors paid the price for their qualifying shares and were sworn, qualified and took office. Likewise, on May 24, 1962 the Directors adopted by-laws and elected officers.

14. On June 15, 1962, Whitney-Jefferson subscribed for three hundred sixty (360) shares of $100.00 par value stock of the Federal Reserve Bank of Atlanta, Georgia, and paid the necessary portion of the subscription price as required by the Federal Reserve Act, namely $18,000.00.

15. As shown by Whitney Exhibit 5 attached to affidavit of E. A. Waffenschmidt dated August 3, 1962, out of a total 105,298 shares voting, 12,024 shares of Whitney National Bank of New Orleans stock were voted against the consolidation agreement between that Bank and Crescent City National Bank. The consolidation was effected on May 24, 1962 and at this point Whitney Holding Corporation was the owner of all of the shares (except directors' qualifying shares) of Whitney National Bank of New Orleans (as consolidated), subject to the rights of those who had voted against the consolidation to perfect their dissents pursuant to the terms of 12 U.S.C. Section 215(b). No shareholder requested receipt of the value of his shares within thirty days after the consolidation pursuant to 12 U.S.C. Section 215(b).

16. During the period June 4-June 8, 1962, Whitney-Jefferson commenced negotiations for a temporary site for its

banking operations with the owner of the premises 4407 Jefferson Highway. On June 13, 1962, Whitney-Jefferson instructed and authorized the real estate agent negotiating the lease on behalf of Whitney-Jefferson to enter into a formal lease agreement on its behalf, which lease was executed and effective June 15, 1962. There was no self-service "Washateria" or any activity of that nature, in operation at 4407 Jefferson Highway on July 3, 1962, and there had been none since prior to the time of commencement of the negotiations aforesaid. Affiant knows of no obstacle which would have prevented the completion of a lease agreement prior to June 15, 1962. Whitney-Jefferson at any time on or subsequent to June 9, 1962 was in a position to commence banking operations in available premises within twenty-four hours after the issuance of a certificate of authority to commence business by the Comptroller of Currency. All equipment, furniture and supplies necessary to open the bank were on hand. Since time of commencement of negotiations for the lease as aforesaid, there was no furniture or equipment in the premises 4407 Jefferson Highway and no indication of prior use as a self-service "Washateria" other than readily removable exterior signs on the premises.

17. Whitney-Jefferson finally acquired its proposed permanent site, 4408 Jefferson Highway, on June 29, 1962. The "Royal Tourist Court" has not been in operation since that time.

s/ James Gilly, Jr.

Sworn to and Subscribed before me this 8 day of September, 1962.

Bartholomew P. Sullivan, Jr.,
Notary Public.

September 14, 1962

INTERVENING WHITNEY EXHIBIT 6

TREASURY DEPARTMENT
Comptroller of the Currency
Washington 25, D.C.

May 11, 1962.

Mr. Malcolm L. Monroe
Monroe & Lemann
Attorneys and Counsellors at Law
Whitney Building
New Orleans 12, Louisiana

Re: "Whitney National Bank in Jefferson Parish", Louisiana, organizing

Dear Mr. Monroe:

We have your letter of May 10, enclosing the following organization papers of the subject bank:

Articles of Association
Organization Certificate
Waiver of Notice of Meeting of Shareholders
Minutes of Meeting of Shareholders
General Form or Bylaws
Official Signatures of Officers
List of Directors

These documents, with the exception of the Bylaws and Official Signatures of Officers have been placed on file.

The Official Signatures of Officers should be re-executed (additional form enclosed) after the Directors become qualified to elect them and the date of their election should be inserted thereon. As you know, the elected Directors in order to qualify must own in their own right shares of the capital stock of the association the aggregate par value of which is not less than $1,000. When this has been accomplished we should be furnished with an affidavit from the Attorney for the bank stating that the Directors paid for the qualifying shares of stock in their own names.

The Bylaws are being returned for execution after the Directors have qualified as set forth above.

Since the corporate existence of the national bank has

now been established with the filing of the Articles of Association and Organization Certificate, in acceptable form, contracts may be entered into and disbursements for the purchase of equipment, supplies, etc., from the capital funds of the bank may properly be made. It is important, of course, that complete data and supporting documents be maintained for subsequent use in recording the disbursements made from the capital funds on the new bank's general ledger.

Before charter can be issued, it will be necessary for the following to have been received in this office, in proper form:

(1) Affidavit from the Attorney for the bank stating that the Directors own in their own right shares of the capital stock of the association the aggregate par value of which is not less than $1,000.

(2) Executed General Form of Bylaws.

(3) Re-executed Signatures of Officers.

(4) Certificate of Payment of Capital Stock.

(5) Notification from the Federal Reserve Bank of Atlanta, Georgia, that the required payment has been made on the subscription to Federal Reserve Stock.

(6) About ten days in advance of the anticipated date for the opening for business, this office should be furnished with an itemized list of disbursements made from the capital funds of the bank, also a detailed list of all of the organization expenses of every type which the bank is committed for, but which are not paid or for which checks have been issued and are outstanding. Certified copies of the minutes of the meetings or meetings of the Board of Directors at which the expenses incurred (other than those previously approved by the shareholders) were approved by the Board should be submitted with the list. If the expenses include any Attorney's fee a copy of the Attorney's bill submitted to the organizers showing the nature of the services rendered, the hours devoted to the task and the separate charges made therefor, should accompany the minutes. As of the same date, an officer of the depositary bank should certify to us the amount remaining in the account of the organizing bank. If any disbursements listed are represented by checks that have not cleared at that time, those items should be prop-

erly identified in order to enable reconcilement of the funds on hand with the total capital funds collected.

Upon receipt of advice that the above requirements have been met and a definite date for the opening of the bank has been determined, the case will have further attention.

Very truly yours,

s/ WILLIAM B. CAMP,
Deputy Comptroller of the Currency.

Enclosures

Filed September 18, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

Civil Action No. 1857-62

ANSWER OF INTERVENING DEFENDANT TO COMPLAINT OF INTERVENING PLAINTIFF, J. W. JEANSONNE, STATE BANK COMMISSIONER OF THE STATE OF LOUISIANA.

Whitney National Bank in Jefferson Parish, the intervening defendant, answers the complaint of intervening plaintiff, J. W. Jeansonne, State Bank Commissioner of the State of Louisiana, as follows:

First Defense

The complaint fails to state a claim upon which relief can be granted.

Second Defense

1

It is admitted that intervening plaintiff, State Bank Commissioner of the State of Louisiana (hereinafter called the Commissioner), under the terms of the statutes described in Paragraph 1 is charged with certain administrative duties as described therein. The allegations contained in paragraph 1 are otherwise denied, and intervening defendant specially avers that such powers as may be vested in the Commis-

sioner by virtue of said statutes are restricted to banks organized under the laws of the State of Louisiana.

2

It is admitted that the Commissioner is suing on his own behalf as the State Bank Commissioner of the State of Louisiana. The allegations contained in Paragraph 2 are otherwise denied.

3

The allegations of the first sentence of Paragraph 3 are admitted. Intervening defendant denies the allegations of the second sentence of Paragraph 3 except to admit that Whitney Holding Corporation, a corporation duly organized under the laws of the State of Louisiana and duly recognized as a bank holding company pursuant to the applicable Federal statutes, owns all of the outstanding stock of Whitney National Bank of New Orleans, except directors' qualifying shares.

4

The allegations contained in Paragraph 4 are denied, except to admit the existence of 28 U.S.C. § 1331. Intervening defendant specially avers that insofar as the subject matter of the complaint of the Commissioner involves the Comptroller of the Currency, it is strictly within an area committed to the sole and uncontrolled discretion of said Comptroller and is not subject to judicial review.

5

The allegations of the first sentence of Paragraph 5 are admitted. The allegations of the second sentence deal in relative terms and if called upon to admit or deny the said allegations, intervening defendant denies same for lack of sufficient information to justify a belief. Intervening defendant admits that as of June 30, 1961 it held approximately 39% of the total deposits of all banks in the Parish of Orleans, State of Louisiana, and 44% of all deposits of individuals, partnerships and corporations, but the remaining allegations of the third sentence of the first paragraph of Paragraph 5 are in relative terms, and if called upon to admit or deny said allegations, intervening defendant de-

nies same for lack of sufficient information to justify a belief.

The allegations of the second paragraph of Paragraph 5 are denied for lack of sufficient information to justify a belief.

6

The allegations contained in Paragraph 6 are denied, except to admit the existence of 12 U.S.C. § 36, and intervening defendant specially avers that said § 36 has no application to the subject matter of the complaint of the Commissioner.

7

Intervening defendant admits the existence of Louisiana Revised Statutes 6:54, which is applicable only to banks organized under the laws of the State of Louisiana. Intervening defendant otherwise denies the allegations of Paragraph 7 and avers that said statutory provision has no application whatsoever to the subject matter of the complaint of the Commissioner.

8

The allegations contained in Paragraph 8 are denied except to admit the existence of the banks named in said paragraph. Intervening defendant specially avers that one of said banks, namely Merchants Trust and Savings Bank, originally was a plaintiff in this litigation, and later was permitted to withdraw as a plaintiff at its own request.

9

The allegations of Paragraph 9 are denied, except to admit the existence of the banks named therein and to admit that there is competition among the banks located in Orleans Parish (City of New Orleans) Louisiana. National Bank of Commerce in New Orleans, the second largest bank in the Parish of Orleans, has established in Jefferson Parish an affiliate under the name National Bank of Commerce in Jefferson Parish, which affiliate has been operating in Jefferson Parish since 1955. This banking operation now has a main office and four branches in Jefferson Parish. Likewise, one of the major stockholders and directors of National American Bank in New Orleans, the fourth largest bank in the Parish of Orleans, is a director of and holds forty per

cent (40%) of the stock of Merchants Trust and Savings Bank a state-chartered banking operation in Jefferson Parish which was originally a plaintiff in this litigation and subsequently was permitted to withdraw. The Commissioner has never made and is not now making any attempt to prevent these two operations in Jefferson Parish.

10

The allegations contained in Paragraph 10 are denied.

11

Intervening defendant denies the allegations of Paragraph 11 except to admit that Whitney National Bank of New Orleans, Crescent City National Bank, and Whitney Holding Corporation participated in a reorganization program, all of the phases of which received the required approvals of the appropriate regulatory authorities. In addition, intervening defendant avers that Crescent City National Bank was properly organized and received due approval of, and a certificate of authority to commence business from, the Comptroller of the Currency, which action on the part of the Comptroller of the Currency was in an area committed to his sole discretion and is not subject to judicial review. Intervening defendant avers also that the matters alleged in Paragraph 11 have no bearing whatsoever on the subject matter of the complaint of the Commissioner.

12

The allegations of Paragraph 12 are denied.

13

The allegations of Paragraph 13 are denied, except to admit that all due approvals were obtained with respect to the steps actually taken, and that defendant Comptroller has filed an affidavit in this proceeding under date of August 9, 1962, which contains the paragraphs quoted.

14

The allegations of paragraph 14 are denied, except to admit that intervening defendant has filed a supplemental

answer by leave of this Honorable Court which contains the paragraphs quoted.

15

The allegations of Paragraph 15 are denied.

16

The allegations of Paragraph 16 are denied.

17

The allegations of Paragraph 17 are denied, except to admit that there are certain restrictions on the establishment by state banks located in Jefferson Parish of branches in other parishes.

18

The allegations of the first two sentences of Paragraph 18 are in relative terms and if called upon to admit or deny same, intervening defendant denies the allegations thereof. Intervening defendant denies the allegations of the third sentence of Paragraph 18 except to admit that Louisiana law contains certain restrictions on the establishment by state banks located in Orleans Parish of branches in other parishes. The allegations of the fourth sentence of Paragraph 18 are denied.

19

The allegations of Paragraph 19 are denied, and intervening defendant avers that "farther expansion of Whitney Holding Corporation" would be regulated by such officers, boards and bodies as would be proper under statutes and regulations to the extent validly applicable, including the Bank Holding Company Act of 1956, 12 U.S.C. §§ 1841-48.

20

The allegations of Paragraph 20 are denied.

Third Defense

1

All action taken by Whitney National Bank of New Orleans, Crescent City National Bank, Whitney Holding Corporation and intervening defendant in conection with the

subject matter of the complaint of the Commissioner has been taken openly and with full disclosure of all relevant facts and without subterfuge of any kind.

2

The organization of the intervening defendant in no way circumvents, and its commencement of the business of banking in Jefferson Parish, Louisiana, would in no way circumvent, the provisions and purposes of the National Banking Act, but are entirely consistent therewith and authorized thereby. The purpose of the organization of the intervening defendant was to furnish Jefferson Parish the additional local banking facilities urgently needed and sought by those residing and doing business in said Parish, as well as to give Whitney Holding Corporation and its stockholders an opportunity to share in the potential growth offered to banks serving said Parish.

3

The banking facilities to be established by intervening defendant will not in any way or for any purpose constituto a "branch" or "branch facility" of either Whitney National Bank of New Orleans or Whitney Holding Corporation, but intervening defendant is a legal entity separate and distinct from Whitney National Bank of New Orleans and Whitney Holding Corporation.

4

The issuance to intervening defendant by defendant, the Comptroller of the Currency, of a certificate of authority to commence the business of banking will be in accordance with the applicable provisions of the National Bank Act (12 U.S.C. §§ 21-27) and will be within the authority and discretion vested thereby in said defendant.

Fourth Defense

1

The Commissioner attempts to rely upon Act 275 of the Louisiana Legislature of 1962. Said Act was first introduced into the Louisiana House of Representatives as House Bill 1221 on June 3, 1962, just six days prior to the filing

of this suit by the Bank of New Orleans and Trust Company et al. House Bill 1221 was certified by the Governor as emergency legislation on July 4, 1962. Under Louisiana law, House Bill 1221 became immediately effective as law when it was signed by the Governor as Act No. 275 on July 10, 1962, at 4:45 p.m.

2

As first introduced in the House of Representatives, House Bill 1221 would not have prevented Whitney National Bank in Jefferson Parish from opening for business as the stock of said bank was already owned by Whitney Holding Corporation. Subsequent to the granting of a temporary restraining order by this Court on June 27, 1962, which prevented the Comptroller of the Currency from issuing a certificate to commence business to Whitney National Bank in Jefferson Parish, House Bill 1221 was amended by the insertion therein of the present Sub-section 5 of Section 3 of Act 275 (hereinafter referred to as Section 3(5)), which specifically provides as follows:

> "Section 3. Prohibitions upon Acquisition of Bank Shares or Assets.
>
> "It shall be unlawful . . . (5) for any bank holding company or subsidiary thereof *to open for business* any bank not now opened for business, *whether or not, a charter, permit, license or certificate to open for business has already been issued.*" (Underscoring added.)

3

The temporary restraining order issued herein on June 27, 1962, and the preliminary injunction granted by this Court on July 6, 1962, dated July 10, 1962 both of which enjoined the Comptroller of the Currency from issuing a certificate to commence business, were the sole reason that Whitney National Bank in Jefferson Parish did not open its doors for business several weeks prior to July 10, 1962, the effective date of Act No. 275.

4

Because Louisiana Act 275 became effective on July 10, 1962, the *status quo* has been altered since June 27, 1962, the date on which the temporary restraining order was issued.

The Commissioner relies upon Section 3(5) of Act 275 as a ground for judgment in his favor. Consequently, it is necessary that the applicability and constitutionality of Section 3(5) of Act 275 be passed upon if intervening defendant is to be restored to the former position in which it would be had the temporary restraining order not been issued.

5

Intervening defendant specially avers that Act 275 furnishes no basis for granting the Commissioner's request for declaratory relief or for an injunction, either temporary or permanent, against either defendant Comptroller of the Currency or intervening defendant, because Section 3(5) of Act 275 does not apply to the Comptroller of the Currency or to a national bank such as Whitney National Bank in Jefferson Parish.

6

Intervening defendant further avers that Section 3(5) of Act 275, if applicable, violates the statutes and Constitution of the United States in the following respects:

(a) Section 3(5), as attempted to be applied here by the Commissioner, is invalid under the supremacy clause of the United States Constitution (Article VI, Clause 2) in at least two respects:

(1) It would prevent the Comptroller from issuing, in his sole discretion, to a properly and legally organized and chartered national bank, a certificate of authority to commence the business of banking, and is therefore in direct conflict with 12 U.S.C. §§ 26 and 27.

(2) It would prevent the opening of a national bank as properly chartered and organized under federal law, and in this respect is likewise in direct conflict with 12 U.S.C. §§ 26 and 27.

(b) Section 3(5) of Act 275, as attempted to be applied here by the Commissioner, violates the Fourteenth Amendment to the United States Constitution in two respects:

(1) Section 3(5), if applied to Whitney National Bank in Jefferson Parish, constitutes an arbitrary, capricious and unreasonable classification that denies

equal protection of law to the intervening defendant.

(2) Whitney National Bank in Jefferson Parish had completed all steps required by law and was ready to commence business several weeks prior to the effective date of Act 275. Intervening defendant, therefore, had a vested property right which Section 3(5) of Act 275 denies intervening defendant without due process of law.

(c) Section 3(5) of Act 275, as attempted to be applied here by the Commissioner, violates Article I, Section 10 of the United States Constitution in that it impairs the obligation of a contract between the federal government and the intervening defendant.

WHEREFORE, intervening defendant prays that:

(1) The Court enter a judgment declaring and adjudging that defendant, Comptroller of the Currency, is authorized and empowered by the provisions of the National Bank Act (12 U.S.C. §§ 21-27) in his sole discretion to issue to intervening defendant a certificate of authority to commence the business of banking in Jefferson Parish, Louisiana.

(2) The Court deny the prayer of the complaint of intervening plaintiff, J. W. Jeansonne, State Bank Commissioner of the State of Louisiana, for a permanent injunction against defendant.

(3) The Court enter a judgment herein declaring that Section 3(5) of Louisiana Act 275 of 1962 does not apply either to defendant, Comptroller of the Currency, or to intervening defendant, Whitney National Bank in Jefferson Parish, or alternatively, that there be a judgment declaring that the said Section 3(5) of Act 275 is unconstitutional and void.

Intervening defendant further prays for all legal, equitable and declaratory relief.

/s/ BRICE M. CLAGETT,
Attorney for Intervening Defendant
Whitney National Bank in
Jefferson Parish

Filed September 25, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

[Title omitted]

MOTION OF THE NATIONAL ASSOCIATION OF SUPERVISORS OF STATE BANKS FOR LEAVE TO APPEAR AS AMICUS CURIAE.

The National Association of Supervisors of State Banks respectfully moves this Court for an order permitting it to appear as an *Amicus Curiae* in the above-captioned proceeding for the limited purpose set forth below. In support of this motion, the Movant respectfully states as follows:

1. The Plaintiff and Intervening Plaintiffs consent to this Motion. The Defendant and Intervening Plaintiff do not object to Movant's appearance as an *Amicus Curiae* for the limited purposes set forth herein.

2. The National Association of Supervisors of State Banks was founded in 1902 and has 52 Members. It is composed of the officials of State governments responsible for the supervision of State-chartered banking institutions in every State in the Union, and of such officials in the Commonwealth of Puerto Rico and in the Virgin Islands. As of December 31, 1961, State-chartered banking institutions under their jurisdiction numbered 9,446 with total resources in excess of 150 billion dollars.

3. The facts of this case, and the relevant statutes, have been ably set out in the pleadings already filed with this Court and will not be repeated here.

4. The two questions of law raised by the various motions for summary judgment which have been filed, and upon which Movant would like to be heard, are as follows:

(a) whether Louisiana Act 275 of 1962 relating to bank holding companies acts as a bar to the issuance of a certificate of authority by the Defendant, Comptroller of the Currency, to the Intervening Defendant, Whitney National Bank in Jefferson Parish, and, if so, whether said act is constitutional; and

(b) whether the issuance of a certificate of authority by the Defendant, Comptroller of the Currency, to the Intervening Defendant, Whitney National Bank in Jefferson Parish, would constitute an unlawful evasion of the provisions of Section 36(c) of the National Bank Act, 12 U.S.C. 36(c).

5. Movant herewith requests permission to file a Memorandum, as *Amicus Curiae*, on the foregoing two questions. Said Memorandum will be filed on September 25, 1962, which is the date established by an order of Judge Walsh for any further pleadings or memoranda in this case.

6. Movant's interest in the first question set forth above is as follows: There are presently a number of States which prohibit or restrict bank holding companies, or any expansion thereof. Many of these statutes specifically encompass National banks. Accordingly, any holding of this Court that Louisiana Act 275 of 1962 does not bar the expansion of a banking holding company organized under Louisiana statutes to include a National bank in its system, or that the Law is unconstitutional if such is its intention, may affect the validity of other State statutes seeking to prohibit or restrict the expansion of bank holding companies.

7. Movant's interest in the second question is as follows: As this Court has noted, in the National Bank Act "Congress has adopted state law on the establishment of branches by state banks as the measuring stick for the establishment of branches by national banks. 12 U.S.C. 36(c)." *Commercial State Bank of Roseville* v. *Gidney*, 174 F. Supp. 770, 774 (1959), aff'd. 278 F. 2d 871 (D.C. Cir. 1960). The law of the State of Louisiana does not authorize State banks (with capital in excess of $100,000) to establish branches in any Parish beyond the Parish in which its main office is located, if another bank is already located and operating in the Parish into which the large bank would like to expand. (L.R.S. 6:54) Accordingly, under the facts of this case, the Whitney National Bank of New Orleans could not establish a branch in neighboring Jefferson Parish where there are presently other banks in operation. In Movant's opinion, the transaction here involved constitutes an unlawful evasion of the branch banking laws of the National Bank Act inasmuch as it unlawfully evades the branch banking laws of the State of Louisiana. A decision on this matter would also constitute a precedent in the thirty-two States

with statutes either prohibiting or limiting branch banking because the Defendant Comptroller may only be sued in the District of Columbia without his consent.

8. Movant's Members seek appearance before this Court, not in an official capacity of speaking for their respective State governments, but as a group of experts on these important legal issues in which they have a common interest and which have a national impact. They believe that their opinion as to the law on the questions will be of assistance to the Court.

9. Under similar circumstances Movant has previously been granted authority by this Court, and by the Court of Appeals for the District of Columbia, to appear as an *Amicus Curiae: Camden Trust Company* v. *Gidney*, (District Court, Civil Action No. 2-61) aff'd, 301 F. 2d 521 (1962), cert. denied 369 U.S. 886 (1962); *Old Kent Bank & Trust Co.* v. *Martin*, 172 F. Supp. 951 (1959); aff'd. 281 F. 2d 61 (1960).

WHEREFORE, the National Association of Supervisors of State Banks respectfully moves this Court for an order permitting it to appear as an *Amicus Curiae* in the above-captioned proceeding for the limited purpose set forth above.

Respectfully submitted

/s/ James F. Bell
1001 Connecticut Avenue, N. W.
Washington 6, D. C.
Attorney for Movant.

September 25, 1962

Consents:

_____,
Defendant,
Comptroller of the Currency.

_____,
Intervening Defendant,
Whitney National Bank
in Jefferson Parish.

_____,
Plaintiffs,
Bank of New Orleans and Trust Company,
Guaranty Bank & Trust Company.

_____,
Intervening Plaintiff,
Bank of Louisiana in New Orleans.

_____,
Intervening Plaintiff,
J. W. Jeansonne,
Louisiana State Bank Commissioner.

APPENDICES TO MEMORANDUM OF AMICUS CURIAE

NATIONAL ASSOCIATION OF SUPERVISORS OF STATE BANKS,
FILED SEPTEMBER 25, 1962

APPENDIX A

Summary of State Laws Affecting Bank Holding Companies (1962)

States Restricting or Prohibiting Bank Holding Companies

State:

Georgia

Code of Georgia Anno., Section 13-201.1, 13-207, enacted February 9, 1960.[1]

Illinois

Smith-Hurd Ill. Anno. Stat., Ch. 16-1/2, Sections 71 through 76, enacted July 5, 1957.[2]

Indiana

Burns Ind. Stat. Anno., Sections 18-1814 through 18-1817, enacted March 12, 1957.[3]

Kansas

Gen. Stat. of Kansas Anno., Sections 9-504 through 9-507, enacted June 29, 1957.[4]

Kentucky

Ky. Revised Stat., Section 287.030, enacted in 1938.[5]

Louisiana

La. Revised Stat., Title 6, Ch. 12, Sections 1001 through 1006, enacted July 10, 1962.[6]

Michigan

Michigan Stat. Anno., Section 21.10, enacted October 17, 1933. (See *Peoples Savings Bank* v. *Stoddard*, 359 Mich. 297, 102 N.W. 2d 777, 792 (Supreme Court, 1960) (dictum) for applicability to National banks).

State

Mississippi

Miss. Code, Section 5235, enacted April 2, 1934.

New Jersey

N. J. Stat. Anno., Sections 17:9A-344 through 17:9A-354, enacted June 5, 1957.[6]

Pennsylvania

Purdon's Pa. Stat. Anno., Title 7, Sections 851 through 855, enacted July 11, 1957.[3]

South Carolina

Code of Laws of S.C., Section 12-77, enacted March 13, 1940.[7]

Vermont

Vermont Stat. Anno., Title 11, Section 131, enacted April 1, 1915.

Washington

Revised Code of Wash., Section 30.04.230, enacted February 27, 1933.[5]

West Virginia

W. Va. Code Anno., Section 3220, enacted February 28, 1959 (effective in 90 days).

States Permitting Bank Holding Companies with State Approval

State

Florida

Fla. Stat. Anno., Section 659.14, enacted May 20, 1953.

Massachusetts

Mass. Gen. Laws Anno., Ch. 167A, Sections 1 through 7, enacted September 21, 1957.

New York

Book 4, Banking Law, Art. III-A, Sections 141-147, first enacted January 29, 1957.

Note: The statutes of Florida and Washington are specifically limited in their application to State Banks. The remaining statutes either provide expressly that they are applicable to National banks as well as State banks, or they apply generally to all "banks", "banking corporations", "banking institutions", or in the case of the Vermont statute, only to "corporations."

[1] Company cannot acquire more than 5% of the stock of two or more banks.
[2] Company cannot acquire more than 15% of the stock of two or more banks.
[3] Company cannot acquire more than 25% of the stock of two or more banks.
[4] Company cannot acquire more than 50% of the stock of a bank.
[5] Company cannot acquire more than 25% of the stock of a bank.
[6] Company owning more than 25% of the stock of a bank cannot acquire more than 10% of the stock of another bank.
[7] Company cannot acquire more than 49% of the stock of a bank.

* The date of enactment is in each case the date that the statute presently effective became effective in its original form.

APPENDIX B

Summary of State Laws Restricting or Prohibiting Bank Holding Companies Prior to the Passage of the Bank Holding Company Act of 1956 [1]

State

Georgia

Ga. Laws 1956, Vol. 1, pp. 309-312, enacted February 27, 1956. See Appendix C.[2]

Illinois

Ill. Laws 1955, 69th Gen. Assembly, at pp. 1372 and 1373, enacted July 11, 1955. Company cannot acquire more than 15% of the stock of two or more banks.[3]

Kentucky

See Appendix A.

Michigan

See Appendix A. Corporation may not hold bank stock unless it was acquired as part of a plan of reorgsnization.

Mississippi

See Appendix A. Prohibits bank holding companies.

South Carolina

See Appendix A.

Vermont

See Appendix A.

Washington

See Appendix A.

West Virginia

See Appendix A. Prohibits bank holding companies.

Note: The Washington statute is specifically limited in its application to State banks.

---

[1] May 9, 1956.

[2] These sections, quoted in Appendix C, were repealed on February 9, 1960, when the presently effective Section 13-207 was enacted.

[3] Repealed on July 5, 1957, when the presently effective Sections 71-76 were enacted.

Appendix C

Georgia Bank Holding Company Act of 1956

"Be It Enacted by the General Assembly of Georgia as Follows:

Section 1. The maintenance of competitive services between banks has been found to be the best method of serving the public. There are dangers in the concentration of economic power through centralized control of banks. It is, therefore, held to be in the public interest to curtail such concentration of economic power by preventing the expansion of bank holding companies and similar organizations.

Sec. 2. Unless the context requires otherwise: (a) 'Bank' means any national bank or State bank, banking association, savings bank or trust company, whether organized under the laws of Georgia, the laws of another State, or the laws of the United States, doing business in the State of Georgia.

(b) 'Company' means any bank, corporation, partnership, joint stock company, business trust, voting trust, association or similarly organized group of persons, whether incorporated or not, and includes the shareholders and those persons who otherwise own the company and including any foreign corporation or other organization or association doing business in Georgia, but shall not include any corporation or community chest, fund or foundation, organized and operated exclusively for religious, charitable, scientific, literary or educational purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation.

(c) 'Bank holding company' means any company incorporated or organized under the laws of the State of Georgia or doing business in Georgia, which directly or indirectly owns, controls or holds, with power to vote, 15 percent or more of the voting stock of each of 2 or more banks.

(d) A company will be construed to own, control or hold, with power to vote, stock indirectly whenever any officer or shareholder of such company or any natural person included within the definition of 'company' in section (b) of this Act or any member of the immediate family of such officer or

shareholder or of such natural person, shall own, control or hold, with power to vote, such stock. Immediate family includes a spouse, children, mother, father, brother, and sister.

Sec. 3. It shall be unlawful for any company directly or indirectly to own, control, vote, or hold, with power to vote the same, 15 percent or more of the voting stock of each of 2 or more banks, except that it shall not be unlawful for a company to continue to own, control, vote, or hold, with power to vote, such voting stock as it owns, controls, or holds on the effective date of this act. Also, in municipalities now having branches of a bank with a holding-company relation, such bank may make branches of existing holding-company banks; and in the future in cities of over 80,000 population, according to the 1950 or subsequent census, now having branches of a bank, present branches will have the same privilege of additional branches as permitted to other banks.

Sec. 4. It shall be unlawful for any company directly or indirectly to own, control, vote, or hold, with power to vote the same, 15 percent or more of the voting stock of a bank holding company, except that it shall not be unlawful for a company to continue to own, control, vote, or hold, with power to vote, that stock of a bank holding company which it owns, controls, or holds on the effective date of this act.

Sec. 5. It shall be unlawful for any company hereafter to acquire, with power to vote the same, 15 percent or more of the voting stock of each of 2 or more banks, except that it shall not be unlawful for any company to acquire, with power to vote the same, any stock in banks, a majority of whose voting stock such company owns, holds, or controls, on the effective date of this act.

Sec. 6. It shall be unlawful for any company to acquire, with power to vote the same, 15 percent or more of the voting stock of a bank holding company.

Sec. 7. It shall be unlawful for any foreign company owning, controlling, or holding, with power to vote the same, 15 percent or more of the voting stock of each of 2 or more banks, to vote more than 15 percent of the stock of more than 1 such bank in any 1 year, except that it shall not be unlawful for a company to vote that voting stock which it owns, controls, or holds on the effective date of this act.

Sec. 8. This act shall not apply to the holding by a com-

pany in respect of its owning, controlling, or holding, with power to vote, stock in a bank or banks or bank holding company or companies in a fiduciary capacity, unless such stock is held for the benefit of another company or for the benefit of a majority of the stockholders of such bank.

Sec. 9. Any company which violates any provision of this act shall, upon conviction, be fined not less than $500 nor more than $1,500. Each day on which such violation occurs will constitute a separate offense.

Sec. 10. If any provision of this act or the application of any such provision to any person or circumstance shall be held invalid, the remainder of the act, and the application of such provision to persons or circumstances other than those to which it is held invalid, shall not be effected thereby.

Sec. 11. All laws and parts of law in conflict with this act hereby are repealed.

(Ga. Laws 1956, Vol. 1, pp. 309-312. Repealed February 9, 1960. See Code of Ga. Anno., Section 13-207.)

Appendix D

Summary of Branch Banking Statutes of the 50 States, Puerto Rico, and Virgin Islands

States Permitting Statewide Branch Banking

State	Citation
Alaska	Sess. Laws of Alaska, Section 3.208
Arizona	Arizona Revised Stat. Anno., Sec. 6-223
California	Calif. Financial Code Anno., Sec. 500
Connecticut	Gen. Stat. of Conn., Revision of 1958, Sec. 36-59
Delaware	2 Del. Code Anno., Title 5, Sec. 770
Hawaii	Revised Laws of Hawaii, Sec. 178-39
Idaho	Idaho Code, Sec. 26-1001
Louisiana	La. Revised Stat., Title 6, Sec. 54
Maryland	Anno. Code of Md. 1957, Art. 11, Sec. 65
Nevada	Nevada Revised Stat. Title 55, Ch. 669, Sec. 660.010
North Carolina	Gen. Stat. of N.C., Sec. 53-62
Oregon	Oregon Rev. Stat., Sec. 714.020
Rhode Island	Gen. Laws of R. I., Sec. 19-1-13
South Carolina	Code of Laws of S.C., Sec. 8-57
South Dakota	S.D. Code of 1939, Sec. 6.0402
Utah	Utah Code Anno., Sec. 7-3-6
Vermont	Vermont Stat. Anno., Title 8 Sec. 501
Washington	Revised Code of Wash., Sec. 30.40.020
Puerto Rico	Laws of P.R. Anno., Title 7, Sec. 111 (i)

States Permitting Branch Banking Within Limited Areas

State	Citation
Alabama	Acts of 1953, 1955, 1957; Code of Alabama, Sec. 125 (1)
Georgia	Code of Ga. Anno., Sec. 13-203.1
Indiana	5 Burns Ind. Stat. Anno., Sec. 18-1707
Kentucky	Ky. Revised Stat., Sec. 287.180
Maine	Revised Stat. of Maine, Ch. 59, Sec. 19-C (1961 Supp.); Ch. 59, Sec. 124 (1961 Supp.)
Massachusetts	Mass. Gen. Laws Anno., Ch. 172, Sec. 11 (1961 Supp.) Ch. 172 A, Sec. 12
Michigan	Mich. Stat. Anno., Secs. 23.762, 23.762 (1)
Mississippi	Miss. Code, Secs. 5228, 5229
New Jersey	N.J. Stat. Anno., Sec. 17:9A-19
New Mexico	N.M. Stat. Anno., Sec. 48-2-17
New York	Book 4, Banking Law, Sec. 105
Ohio	Page's Ohio Revised Code Anno., Sec. 1103.09
Pennsylvania	Purdon's Pa. Stat. Anno., Title 7, Sec. 819-204.1
Tennessee	Tenn. Code Anno., Sec. 45-211
Virginia	Code of Va., Art. 3, Sec. 6-26

States Prohibiting Branch Banking

Arkansas*	Ark. Stat. 1947 Anno., Sec. 67:319
Colorado	Colo. Revised Stat., Sec. 14-13-1
Florida	Fla. Stat. Anno., Sec. 659.06
Illinois	Smith-Hurd Ill. Anno. Stat., Ch. 16-1/2, Sec. 106
Iowa*	Ia. Code Anno., Sec. 528.51
Kansas*	Gen. Stat. of Kansas Anno., Sec. 9-111 (1959 Supp.)
Minnesota	Minn. Stat. Anno., Sec. 48-34
Missouri*	Vernon's Anno., Mo. Stat., Sec. 362.105
Montana	Revised Codes of Mont. Anno., Sec. 5-1028
Nebraska*	Revised Stat. of Neb., Sec. 8-1,105
North Dakota*	N. D. Revised Code, Sec. 6-03-14
Oklahoma*	Okla. Stat. Anno., Title 6, Ch. 19, Sec. 461
Texas	Vernon's Civil Stat. of Texas Anno., Art 342-903
West Virginia	W. Va. Code Anno., Sec. 3131
Wisconsin*	West's Wisc. Stat. Anno., Sec. 221.04

States with No Legislation Authorizing Branch Banking

New Hampshire
Wyoming
Virgin Islands

* These states permit certain offices with limited powers only.

Filed September 26, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action Number 1857-62

[Title omitted]

OPPOSITION OF J. W. JEANSONNE, STATE BANK COMMISSIONER OF LOUISIANA TO THE MOTION FOR SUMMARY JUDGMENT BY DEFENDANT, COMPTROLLER OF THE CURRENCY, AND WHITNEY NATIONAL BANK IN JEFFERSON PARISH, INTERVENING DEFENDANT, AND CROSS-MOTION FOR SUMMARY JUDGMENT.

Now comes Intervening Plaintiff, J. W. JEANSONNE, State Bank Commissioner of Louisiana, who opposes the motions for summary judgment filed herein by the Defendant and Intervening Defendant, and cross-moves for summary judgment on the following grounds:

1

There is no genuine issue as to any material facts upon which plaintiffs and Intervening-Plaintiffs rely in support of cross-motions for summary judgment; and Plaintiffs are entitled to summary judgment as a matter of law.

BENTLEY G. BYRNES,
Special Assistant Attorney General and Attorney for,
J. W. Jeansonne, State Bank Commissioner
403 California Company Building,
New Orleans 12, Louisiana.

LIST OF EXHIBITS IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT BY INTERVENING PLAINTIFF, J. W. JEANSONNE, STATE BANK COMMISSIONER OF LOUISIANA.

1. Intervening Plaintiff adopts in support of his Motion for Summary Judgment the list of exhibits filed on behalf of Plaintiffs.

2. J. W. Jeansonne Affidavit, designated "Jeansonne, Exhibit No. 1".

Filed September 26, 1962

INTERVENING PLAINTIFF, J. W. JEANSONNE

EXHIBIT 1

STATE OF LOUISIANA,
Parish of Avoyelles:

Before me, the undersigned authority, personally came and appeared:

J. W. JEANSONNE, a person of the full age of majority and a resident of Marksville, Parish of Avoyelles, State of Louisiana, who after being by me, Notary, first duly sworn, did depose and say that:

1

I am the duly appointed and qualified State Bank Commissioner of Louisiana, and as such, I am charged by law with the duty of administering and enforcing the banking laws of Louisiana.

2

It is and has been the policy of the State of Louisiana to protect and foster the welfare and growth of independent unit banks, institutions owned and having their origins in local communities and deriving their business chiefly from the industrial, commercial and farming activities located therein. It was in furtherance of this policy that the State of Louisiana by statute prevented the undesirable concentration of control of banks and bank credits in the hands of a few large banks by prohibiting banks from expanding their activities into Parishes (Counties) beyond the Parish in which said banks are chartered to do business.

3

To the best of my knowledge, until the Whitney National Bank of New Orleans created the Whitney Holding Corporation for the express and announced purpose of expanding its operations into Jefferson Parish, Louisiana had not been faced with an attempt by a bank to frustrate its established policy by circumvention of the prohibition against branch banking through the medium of a holding company. Faced for the first time with the attempt by the Whitney National Bank, which was limited by both Federal and State law to carry on its banking business only in the Parish of Orleans, to expand its activities into the adjoining Jefferson Parish by means of creating, from its own resources, a bank holding corporation designed to own all of the stock of the existing Whitney National Bank as well as all of the stock of a proposed Whitney operation in Jefferson Parish, I requested the Attorney General of the State of Louisiana to render an opinion to me on the legality of this.

As a result of my request, the Attorney General rendered his written opinion to me as State Bank Commissioner. A copy of said opinion is attached to this affidavit as Exhibit 1.

4

Confronted with this effort by the Whitney National Bank to violate or circumvent the long existing Federal and Louisiana bank branching prohibitions merely by means of the creation of a holding company, the Louisiana Legislature enacted Act No. 275 of 1962, copy of which is also attached to this affidavit as Exhibit 2. Representatives of the Whitney organization desperately attempted to defeat this legislation during the legislative proceedings, but nevertheless the House of Representatives voted eighty to sixteen in favor of it, and the Senate voted twenty-eight to seven in favor thereof.

Because the Whitney National Bank of New Orleans and the holding company created by it were racing the Legislature of Louisiana in an attempt to open banking facilities in Jefferson Parish, the Governor of the State of Louisiana, pursuant to Constitutional authority, declared Act No. 275 of 1962 to be emergency legislation and it became law when signed by the Governor on July 10, 1962.

As the State Bank Commissioner I am charged with the duty of enforcing the Louisiana Bank Holding Company Act and preventing evasions thereof. Pursuant to this statutory obligation, I have appeared in this suit for the purpose of applying to this Court for such orders as may be necessary to enjoin and prohibit the Comptroller of the Currency from issuing his certificate to authorize the opening of banking facilities by the Whitney organization in violation of Act 275 of 1962 and the other applicable statutes, both Federal and State.

J. W. JEANSONNE.

Sworn to and subscribed before me this 21st day of September, 1962.

B. C. BENNETT,
Notary Public.

Filed September 26, 1962

EXHIBIT 3

SENATE BILL NO. 30, LEGISLATURE, STATE OF GEORGIA, by Senator Lambert

A bill to be entitled "An act to provide for the prohibition of the owning, controlling or holding by certain companies of more than 15 percent of voting stock of banks as defined therein and of bank holding companies as defined therein; to define company as included in said prohibition to include any bank, corporation, partnership, joint stock company, business trust, voting trust, association, or similarly organized group of persons and the shareholders and those persons who otherwise own the company or are officers thereof; to provide that stock held by the immediate family of a shareholder, owner, or officer of a company as defined in the act shall be construed to be owned, controlled or held by the company; to provide for restriction of certain foreign companies in voting stock of said bank or holding company; and to provide for certain exceptions to said prohibition and restriction and for other purposes."

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA AS FOLLOWS:

Section 1. The maintenance of competitive services between banks has been found to be the best method of serving the public. There are dangers in the concentration of economic power through centralized control of banks. It is, therefore, held to be in the public interest to curtail such concentration of economic power by preventing the expansion of bank holding companies and similar organizations.

Sec. 2. Unless the context requires otherwise: (a) "Bank" means any national bank or State bank, banking association, savings bank or trust company, whether organized under the laws of Georgia, the laws of another State, or the laws of the United States, doing business in the State of Georgia.

(b) "Company" means any bank, corporation, partnership, joint stock company, business trust, voting trust, association, or similarly organized group of persons, whether incorporated or not, and includes the shareholders and those persons who otherwise own the company and including any foreign corporation or other organization or association doing business in Georgia, but shall not include any corporation or community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation.

(c) "Bank holding company" means any company incorporated or organized under the laws of the State of Georgia or doing business in Georgia, which directly or indirectly owns, controls, or holds, with power to vote, 15 percent or more of the voting stock of each of 2 or more banks.

(d) A company will be construed to own, control, or hold, with power to vote, stock indirectly whenever any officer or shareholder of such company or any natural person included within the definition of "company"

in section (b) of this act or any member of the immediate family of such officer or shareholder or of such natural personan, shall own, control or hold, with power to vote, such stock. Immediate family includes a spouse, children, mother, father, brother and sister.

Sec. 3. It shall be unlawful for any company directly or indirectly to own, control, vote, or hold, with power to vote the same, 15 percent or more of the voting stock of each of 2 or more banks, except that it shall not be unlawful for a company to continue to own, control, vote, or hold, with power to vote, such voting stock as it owns, controls, or holds, on the effective date of this act. Also, in municipalities now having branches of a bank with a holding-company relation, such banks may make branches of existing holding-company banks; and in the future in cities of over 80,000 population, according to the 1950 or subsequent census, now having branches of a bank, present branches will have the same privilege of additional branches as permitted to other banks.

Sec. 4. It shall be unlawful for any company directly or indirectly to own, control, vote, or hold, with power to vote the same, 15 percent or more of the voting stock of a bank holding company, except that it shall not be unlawful for a company to continue to own, control, vote, or hold, with power to vote, that stock of a bank holding company which it owns, controls, or holds on the effective date of this act.

Sec. 5. It shall be unlawful for any company hereafter to acquire, with power to vote the same, 15 percent or more of the voting stock of each of 2 or more banks, except that it shall not be unlawful for any company to acquire, with power to vote the same, any stock in banks, a majority of whose voting stock such company owns, holds, or controls, on the effective date of this act.

Sec. 6. It shall be unlawful for any company to acquire, with power to vote the same, 15 percent or more of the voting stock of a bank holding company.

Sec. 7. It shall be unlawful for any foreign company owning, controlling, or holding, with power to vote the same, 15 percent or more of the voting stock of each of 2 or more banks, to vote more than 15 percent of the

stock of more than 1 such bank in any 1 year, except that it shall not be unlawful for a company to vote that voting stock which it owns, controls, or holds on the effective date of this act.

Sec. 8. This act shall not apply to the holding by a company in respect of its owning, controlling, or holding, with power to vote, stock in a bank or banks or bank holding company or companies in a fiduciary capacity, unless such stock is held for the benefit of another company or for the benefit of a majority of the stockholders of such bank.

Sec. 9. Any company which violates any provision of this act shall, upon conviction, be fined not less than $500 nor more than $1,500. Each day on which such violation occurs will constitute a separate offense.

Sec. 10. If any provision of this act or the application of any such provision to any person or circumstance shall be held invalid, the remainder of the act, and the application of such provision to persons or circumstances other than those to which it is held invalid, shall not be affected thereby.

Sec. 11. All laws and parts of law in conflict with this act hereby are repealed.

Filed September 26, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

[Title omitted]

ORDER GRANTING MOTION OF THE NATIONAL ASSOCIATION OF SUPERVISORS OF STATE BANKS FOR LEAVE TO APPEAR AS AMISCUS CURIAE

The National Association of Supervisors of State Banks, having requested by Motion that it be permitted to appear as *Amicus Curiae* in the above-entitled proceeding; and the

Court having fully considered the Motion; and it appearing that all of the above-named parties have consented:

It is ordered that the Motion of the National Association of Supervisors of State Banks for leave to appear as *Amicus Curiae* in this proceeding be and the same is hereby granted.

Dated: September 26, 1962.

/s/ JOHN J. SIRICA,
District Judge.

Filed September 27, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

[Title omitted]

PLAINTIFFS' SUPPLEMENTAL STATEMENT OF GENUINE ISSUES UNDER LOCAL RULE 9H IN OPPOSITION TO INTERVENING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

Come now the plaintiffs, and with respect to the affidavit of James Gilly, Jr., President of Intervening Defendant, dated September 8, 1962, file the following Supplemental Statement of Genuine Issues Under Local Rule 9(h) in opposition to Intervening Defendant's Motion for Summary Judgment:

1. In paragraph "2" of said affidavit, Mr. Gilly states that Whitney National Bank in Jefferson Parish "will have no officer or employee common with Whitney National Bank in New Orleans" other than four directors and Mr. Gilly himself, who will serve as President of Whitney-Jefferson and in a top officer capacity at Whitney-New Orleans. While this statement may be true in some respects, it conveys a false impression. The truth is that all officers and directors of both Whitney-Jefferson and Whitney New Orleans, will, *at all times*, be subject to the common control, direction and supervision of the officers and directors of Whitney Holding Corporation, all of whom are subject to the absolute control of Whitney National Bank of New Orleans. Thus, Mr. Gilly's statement may be true as to "form", but it is patently false in reality.

2. Whitney-Jefferson has not yet been recognized as a "newly organized bank", as stated by Mr. Gilly at paragraph "2" of his affidavit (See *Whitney Exhibit 6*, attached to the affidavit). It has not yet received a charter from the Comptroller, and cannot engage in any banking business until the Comptroller issues a certificate, which he is presently enjoined from doing. Whitney-Jefferson is currently no more than an association created under the National Banking Act.

3. Plaintiffs do not agree with and oppose as untrue the statement that "Whitney-Jefferson will operate a banking house entirely separate from that of the Whitney-New Orleans" (*Gilly Affidavit*, P. 2). Whitney-New Orleans has several *branches in the City of New Orleans* itself which "operate in *banking houses separate from the main Whitney-New Orleans*". But, they are still mere branches Plaintiffs state the same will be true of Whitney-Jefferson.

4. Plaintiffs urge the Court to recognize that, contrary to the impression sought to be conveyed in Mr. Gilly's affidavit (*Para. 4*), Whitney-Jefferson did not allegedly subscribe or pay for any stock in the Federal Reserve Bank of Atlanta *until June 15, 1962, 6 full days after this action had begun and the Comptroller was withholding, subject to this suit, the issuance of any certificate to Whitney-Jefferson* (See *Gilly Affidavit*, P. 14). Thus, this stock was subscribed and paid for by Whitney with full knowledge of the injunction voluntarily in effect herein.

5. Plaintiffs deny that, in effect or practice, the capital and surplus of Whitney-Jefferson and Whitney-New Orleans, totaling $30,600,000. will be used separately to require decreased "loan limits" for the two banks, as asserted at *paragraph "5"* of Mr. Gilly's affidavit. On the contrary, *in the same paragraph of the affidavit*, Mr. Gilly admits that the two banks, *subject to the common control of the Holding Corporation created by Whitney-New Orleans*, will participate in loans with each other. Please see also *Plaintiffs' Exhibit "B"*, the letter of October 28, 1961 of President Berry of Whitney-New Orleans to his shareholders, where he states, at page 2:

> "From the depositors' point of view, those in the smaller bank will be assured of the same management which directs the larger one. . . . *They will be assured of*

access to the large loan limits of the combined banks".
(Emphasis supplied.)

6. The Court is urged to note, contrary to the overall impression sought to be conveyed by *paragraph "6"* of Mr. Gilly's affidavit, it is boldly admitted finally that

> "the Whitney-Jefferson proposes to clear through the Whitney-New Orleans."

7. Contrary to the impression sought to be conveyed in *paragraph "7"* of Mr. Gilly's affidavit, Mr. Gilly fails to show that it is common for "branches" of national banks to have their own vaults. This condition is not limited to independent banks.

8. Mr. Gilly's statement in *paragraph "8"* of his affidavit is basically untrue. Each check, each piece of stationery and each form used by Whitney-New Orleans and Whitney-Jefferson will carry in bold, large letters the words:

> "WHITNEY NATIONAL BANK".

Moreover, Whitney's evidence of record in this case contains proof of checks carrying both Whitney-New Orleans and Whitney-Jefferson on their face.

9. Plaintiffs deny the impression sought to be conveyed by *paragraphs "9" and "10"* of Mr. Gilly's affidavit. Plaintiffs' exhibits in support of their last brief before this Court consisted of letters from Whitney's own customers, all written on about the same date, stating that they, Whitney-New Orleans customers, looked forward to carrying their accounts at Whitney-New Orleans' "branch" to be established in Jefferson Parish. In truth and in fact, Mr. Gilly's affidavit now admits that this "normal banking practice" will be followed.

10. Plaintiffs deny, for lack of any evidence of record, that "no shareholder requested receipt of the value of his shares" as alleged in Mr. Gilly's affidavit, *paragraph 15*. What happened to the dissenting shareholders? Who bought them out? Or, did they continue to hold their shares throughout effectuation of the Whitney "plan"? These are all matters still genuinely in issue.

11. Plaintiffs urge the Court to recognize, under *para-*

graphs 16 and 17 of Mr. Gilly's affidavit of September 8, 1962, that

(a) Whitney-Jefferson did not even instruct or authorize its real estate agent to enter into a lease "for a temporary site" *until June 13, 1962, 4 days after this action was filed* and the Comptroller was withholding his certificate pending the outcome of this suit;

(b) Said lease was not executed *until June 15, 1962, 6 days after this suit was filed;*

(c) Whitney-Jefferson did not acquire "its proposed permanent site" until June 29, 1962, 20 days after this suit was filed and 2 days after Judge Hart signed the temporary restraining order herein.

The remaining allegations of paragraph 16 are self serving and argumentative.

EDWARD L. MERRIGAN,
Attorney for Plaintiffs.

Filed September 27, 1962

PLAINTIFFS' EXHIBIT "Z-1"

January 31, 1962.

The Honorable James J. Saxon,
The Comptroller of the Currency,
Washington 25, D. C.

Dear Mr. Saxon:

Reference is made to the application by Whitney Holding Corporation, New Orleans, Louisiana, for the Board's approval of the formation of a bank holding company pursuant to section 3(a)(1) of the Bank Holding Company Act. The Corporation seeks approval of its acquisition of the stock of (1) Crescent City National Bank, New Orleans, Louisiana (a proposed new bank), into which would be consolidated the existing Whitney National Bank of New Orleans, under the latter title, and (2) the Whitney National Bank in Jefferson Parish, Louisiana (a proposed new bank). Pursuant to section 3(b) of the Act, a copy of the application

was transmitted to your predecessor, Mr. Gidney, with a request for his views and recommendations. In a letter dated October 11, 1961, Mr. Gidney advised the Board, in part that "In view of the favorable conditions disclosed by this study [of the application] it is recommended that you give your approval to this application."

On January 17, 1962, there was conducted before the Board a public oral presentation of views on Whitney Holding Corporation's proposal. A copy of the stenographic transcript of this proceeding was given to Mr. Mortimer of your staff on January 22. As reflected in this transcript, statements in opposition to the application were presented by Mr. Louis J. Roussel, a stockholder in the Whitney National Bank, by Mr. Clem H. Sehrt, an attorney who represented minority shareholders of the Whitney National Bank, and by Mr. Victor J. Passera, President, The National Bank of Commerce in Jefferson Parish. Mr. Roussel and Mr. Sehrt described certain actions allegedly taken by Whitney National Bank's management, which they charged were in violation or circumvention of existing law and contrary to the rights of the Bank's shareholders (Tr. 25-50). In reply, Mr. Malcolm L. Monroe, counsel for Applicant, stated that, with the exception of

Filed September 27, 1962

EXHIBIT "Z-2"

matters relating to the charter of the proposed bank holding company, all the matters raised by Mr. Roussel ". . . have been fully taken up or disclosed or subject to examination by the Comptroller. The Comptroller's files have full reports. * * * And the Comptroller's examiners have been into every matter that has been discussed by him [Mr. Roussel]" (Tr. 54). Similar replies by Mr. Monroe relative to Mr. Sehrt's statements are found at pages 55-56 of the transcript.

In view of the bearing that these matters might have on the Board's decision on Whitney Holding Corporation's application, the Board would appreciate any comments that you may have relative to these statements and responses.

which appear in their entirety at pages 25 through 56 of the transcript of the oral presentation.

Very truly yours,

(Signed) MERRITT SHERMAN,
Secretary.

Approved, minutes, Jan. 31, 1962.

TJO'C:vr
1/31/62

Filed September 27, 1962

EXHIBIT "AA-1"

TREASURY DEPARTMENT
Comptroller of the Currency
Washington 25

February 27, 1962.

Board of Governors
of the Federal Reserve System,
Washington 25, D. C.

Gentlemen:

In accordance with the request contained in your letter of January 31, 1962, I have reviewed the transcript of proceedings of the oral hearing on the application for approval of the Whitney Holding Corporation which was held January 17, 1962.

For your convenience of reference, my observations will deal with the items listed at 1 to 10 in the transcript where comment appears pertinent and such further comments as deemed proper.

(1) The Whitney Holding Corporation is being organized for the purpose of establishing an affiliated bank in Jefferson Parish, Louisiana; and for the purpose of acquiring all the stock of Whitney National Bank as well as the affiliated bank. Since all of the stock of Whitney National Bank (with the exception of qualifying shares) would be owned by the holding company, the effect would be to prevent minority representation through cumulative voting.

(3) The purchase of the real estate referred to did represent a violation of law. The bank purchased a 1/24 interest

in "J. W. Pharr" property in June 1957 for $4,500.00. 18/24 of the property was previously owned, having been acquired d. p. c. in 1933. The 1/24 interest is currently carried on the bank's books at $1.00 and is listed in the current report of examination as a violation of Section 5137, U. S. R. S.

(4) The listing of advisory board members and directors as a group is improper and the bank has been advised to discontinue the practice.

(5) Our examiner reports that the details of the sale of the property on Veterans Highway and Jefferson Parish were spread on the minutes of the board of directors and approved by them. We have no reason to suspect improper procedure; however, the matter will be further investigated.

Filed September 27, 1962

EXHIBIT "AA 2"

(8) At the 1962 annual meeting, the shareholders of the Whitney National Bank reduced the number of directors to be elected from 20 to 7. Determination of the number of directors to be elected is a prerogative of the shareholders. The effect of the reduction was to require a larger number of shares to elect a minority director through cumulative voting.

Mr. Roussel's comments on dividends and Mr. Berry's salary reflect his desires for high dividends as opposed to the director's conservative policies. Neither Mr. Berry's salary nor the conservative dividends have been criticized by this office.

With respect to the comments on the growth of the bank and comparative figures, the Whitney National Bank is the largest bank in Louisiana and it is conservatively operated, and in good condition.

Other comments with respect to the legality and merits of the holding company are matters on which a previous Comptroller of the Currency has expressed himself; therefore, further enlargement on the subject is deemed undesirable.

Should you wish further information on the matter, please advise me.

Very truly yours,

JAMES J. SAXON,
Comptroller of the Currency.

Filed September 27, 1962
Plaintiffs' Exhibit 6C-1

The New Frontiersman of banking

James J. Saxon takes a much broader view of the job of Comptroller of the Currency than his predecessors. He feels his office should lead banking industry



For years, the Comptroller of the Currency was a little-known Treasury Dept. official whose job, in the public's mind at least, seemed to have changed little since Civil War days—that of regulating currency issued by national banks. But Compt. James J. Saxon, a dapper 48-year-old attorney and former Chicago banker, is rapidly making this image obsolete.

Multiple changes. Saxon is jolting the banking industry with proposals and actions that amount to an overhaul of its entire structure. He is studying 43 specific changes in bank regulations, ranging from the technical task of electing bank directors to the highly controversial subject of whether federal law should take precedence over state law. The latter proposal, if accepted, could open such states as Illinois and New York to statewide branch banking.

Though favoring bank expansion, Saxon has taken a strong public stand against undue concentration of banking assets. He played a key role, for example, in the defeat of such undertakings as Morgan Guaranty Trust Co.'s attempt to set up a giant $6-billion bank holding company in New York State. Saxon also has streamlined the Comptroller's own operations by speeding the processing of mergers and the chartering of new banks.

Skirmishes. In an industry where even minor alterations win acceptance at glacial speed, Saxon's moves are sure to rouse opposition. State banking officials see his actions as a resumption of an old federal drive [illegible] banking [illegible]

job, Saxon reached an understanding that the Justice Dept. would keep him informed on all actions in the banking field. But early this year, Kennedy brought antitrust suits against three New Jersey banks without forewarning Saxon. Saxon says he tried to reach Kennedy twice by phone, but then "I saw red." He promptly denounced the "zealots" in Justice. Relations between the two agencies have since improved, but they are still strained.

Disputed issues. If Saxon has his way, there will be a lot more banks with a lot more branches, more liberal lending limits, less concentration in banking, and the gradual centralization of power within the hands of the Comptroller.

In his traditional role, the Comptroller has done little more than conduct bank examinations and rule on mergers and branch applications.

Saxon, though, takes a broader view of the position. "Congress didn't create the Comptroller's job just for housekeeping," he explains. "Someone has to be the leader of the banking industry."

With this concept in mind, Saxon has projected himself into the middle of a hot dispute: how banks are to expand and who is to regulate them.

Dual control. Under present law, each state has the power to permit or restrict expansion moves by nationally or state-chartered banks—whether by branching, merger, or holding company. Thus California allows statewide branch banking, Illinois bans it, and New York carves "self-[illegible] allows



Compt. James J. Saxon, who took office in November, advocates sweeping changes in the banking industry

For years, the Comptroller of the Currency was a little-known Treasury Dept. official whose job, in the public's mind at least, seemed to have changed little since Civil War days—that of regulating currency issued by national banks. But Compt. James J. Saxon, a dapper 48-year-old attorney and former Chicago banker, is rapidly making this image obsolete.

Multiple changes. Saxon is jolting the banking industry with proposals and actions that amount to an overhaul of its entire structure. He is studying 43 specific changes in bank regulations, ranging from the technical task of electing bank directors to the highly controversial subject of whether federal law should take precedence over state law. The latter proposal, if accepted, could open such states as Illinois and New York to statewide branch banking.

Though favoring bank expansion, Saxon has taken a strong public stand against undue concentration of banking assets. He's played a key role, for example, in the defeat of such undertakings as Morgan Guaranty Trust Co.'s attempt to set up a giant $6 billion bank holding company in New York State. Saxon also has streamlined the Comptroller's own operations by speeding the processing of mergers and the chartering of new banks.

Skirmishes. In an industry where even minor alterations swim acceptance at glacial speed, Saxon's moves are sure to rouse opposition. State banking officials see his actions as a resumption of an old federal drive to break down the dual banking system that has been traditional in the U.S. They accuse him of usurping their powers by trying to shift all regulatory authority to Washington. Saxon denies this. But he's also been having trouble with federal banking men, who think he is trying to dominate the scene.

Saxon, in fact, is one of the few Administration officials bold enough to have challenged the President's younger brother, Atty. Gen. Robert F. Kennedy. Before accepting the job, Saxon reached an understanding that the Justice Dept. would keep him informed on all actions in the banking field. But early this year, Kennedy brought antitrust suits against three New Jersey banks without forewarning Saxon. Saxon says he tried to reach Kennedy twice by phone, but then "I saw red." He promptly denounced the "zealots" in Justice. Relations between the two agencies have since improved, but they are still strained.

Disputed issues. If Saxon has his way, there will be a lot more banks with a lot more branches, more liberal lending limits, less concentration in banking, and the gradual centralization of power within the hands of the Comptroller.

In his traditional role, the Comptroller has done little more than conduct bank examinations and rule on mergers and branch applications.

Saxon, though, takes a broader view of the position. "Congress didn't create the Comptroller's job just for housekeeping," he explains. "Someone has to be the leader of the banking industry."

With this concept in mind, Saxon has projected himself into the middle of a hot dispute: how banks are to expand and who is to regulate them.

Dual control. Under present law, each state has the power to permit or restrict expansion moves by nationally or state-chartered banks—whether by branching, merger, or holding company. Thus, California allows statewide branch banking, Illinois bans it, and New York carves itself into nine districts and allows branching only within districts, except in the case of New York City and neighboring suburbs. Some states prohibit bank holding companies, while others allow them.

But state decisions can be vetoed by federal agencies. The Federal Reserve Board of Governors has the final word on state-chartered member banks, and holding companies, the Federal Deposit Insurance Corp., on nonmember insured state banks. The Comptroller is given

jurisdiction over national banks. In all cases, though, the federal agencies are obligated to stay within limits laid down by state law. Each of these agencies must check with the other before making a ruling, and opinions must also be obtained from Justice.

Obviously, there is lots of room for conflict. This week, for example, the Fed voted against a new Florida bank holding company, though Justice and Saxon had seen no objections. As Saxon sees it, the present system is a hodge-podge of antiquated, conflicting federal and state law. He argues the system inhibits, rather than encourages, economic growth by unnaturally preventing adequate bank expansion.

"We must have a maximum of flexibility within the banking industry," Saxon says. He wants banks free to choose their expansion route between mergers, direct branches, or holding companies.

Saxon's solution. The way out, in Saxon's view, is to get Congress to give the Comptroller the authority to approve mergers and branching plans of national banks without regard to state law. In effect, this would force states to liberalize their laws, or else find all their state banks converting to national charters (state banks generally have more liberal lending limits than national banks).

But Saxon does not go along with putting regulatory control into the hands of a single agency. Such an approach was advocated recently by J. L. Robertson, one of the Fed's Board of Governors, who suggested a new Federal Banking Commission.

Long list of problems. Saxon has no illusions that his plans will be accepted gracefully anytime soon—if indeed they are ever accepted. But he is approaching the task with single-minded determination.

When he arrived in Washington last November, Saxon carried his own battle-plan: 24 single-spaced typewritten pages outlining what he thought was wrong with the banking system and what he intended to do about it.

Saxon's first step was to make [illegible] ing through changes in mechanics, for he has the authority to make many of these changes himself. The first group will be out next month.

The "substantive issues" will take more doing. Many would require Congressional action, and state banking authorities are against a number of them. The most controversial proposal would center on making federal law take precedence over state law.

Pressures. By his own actions, Saxon already is trying to exert pressure along these lines. He opposed formation of a new bank holding company in New York State, although approved by authorities there, because he felt there would be too much banking concentration. Saxon is not against expansion in New York, but he prefers branching to the merger or bank holding company route. His argument is that adding branches one at a time is less disruptive in New York's case. By opposing Morgan Guaranty's holding company, Saxon in effect is pressuring the state into liberalizing its branching laws.

In the case of Louisiana's Whitney National Bank, Saxon is also trying to get more liberal state law. In this instance, he favors formation of a holding company that was set up specifically to skirt state rules that limit branching into parishes where a bank already exists. And he has gone to court to challenge a state law hurriedly passed to prohibit the new holding company.

Qualifications. In these and other matters, Saxon is stirring more of a fuss than any Comptroller in recent history. Some bankers regard him as an ambitious man, using his present post as a springboard for more lofty ventures. Even so, they say he is eminently qualified for his job.

Saxon's first job out of college was as an attorney in the Comptroller's office. Later he held various Treasury Dept. posts, including that of attache to Gen. Douglas MacArthur. One of his jobs was to remove several billion dollars worth of gold bullion from Corregidor before the [illegible]



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Saxon's first step was to make an industrywide survey of banking problems. He then boiled these down to 43 separate issues, and appointed a group of committees to make recommendations on them.

Saxon's "43" fall into two general categories: the first he calls "corporate mechanics," which includes such topics as bank examinations, election of bank directors, bank stock dividends; the second, he refers to as "substantive issues"—these are broader concepts.

Saxon expects little trouble pushing. Saxon already is trying to exert pressure along these lines. He opposed formation of a new bank holding company in New York State, although approved by authorities there, because he felt there would be too much banking concentration. Saxon is not against expansion in New York, but he prefers branching to the merger or bank holding company route. His argument is that adding branches one at a time is less disruptive in New York's case. By opposing Morgan Guaranty's holding company, Saxon in effect is pressuring the state into liberalizing its branching laws.

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Saxon himself admits he has made some mistakes. He regrets some incidents where he has "popped off in public." But he feels the controversies have gained his office new standing and have stimulated serious discussion of banking problems. In the long run, he says, this will make the task of "modernizing" the banking system easier. **End**



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Filed October 5, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

[Title omitted]

OPPOSITION OF DEFENDANT COMPTROLLER OF THE CURRENCY TO CROSS-MOTION OF INTERVENING PLAINTIFF J. W. JEANSONNE FOR SUMMARY JUDGMENT.

Comes now the defendant Comptroller of the Currency, by his undersigned counsel, and opposes the cross-motion of intervening plaintiff J. W. Jeansonne for summary judgment herein on the ground that said intervening plaintiff is not entitled to judgment as a matter of law. The pending motions of the defendant and the intervening defendant should be granted and all pending motions of the plaintiffs and the intervening plaintiffs should be denied.

JOSEPH D. GUILFOYLE,
Acting Assistant Attorney General.

DONALD B. MACGUINEAS,
DAVID V. SEAMAN,
Attorneys, Department of Justice
Attorneys for Defendant,
Comptroller of the Currency.

Of Counsel:

DAVID C. ACHESON,
United States Attorney.

Filed October 5, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

[Title omitted]

STATEMENT OF DEFENDANT COMPTROLLER OF THE CURRENCY IN RESPONSE TO THE STATEMENT OF FACTS SUPPORTING THE CROSS-MOTION OF INTERVENING PLAINTIFF J. W. JEANSONNE FOR SUMMARY JUDGMENT.

The cross-motion of intervening plaintiff J. W. Jeansonne for summary judgment, filed herein on September 26, 1962, does not include the statement required by Local Civil Rule 9(h). However, the following is stated in an untitled paper attached to the motion: "Intervening Plaintiff adopts in support of his Motion for Summary Judgment the list of exhibits filed on behalf of Plaintiffs." For present purposes, therefore, we assume that intervening plaintiff intends to adopt as his own the statement of material facts accompanying plaintiffs' cross-motion for summary judgment, filed on July 24, 1962.

Accordingly, we adopt by reference our response thereto, filed on August 10, 1962.

JOSEPH D. GUILFOYLE,
Acting Assistant Attorney General.

DONALD B. MACGUINEAS,
DAVID V. SEAMAN,
Attorneys, Department of Justice
Attorneys for Defendant,
Comptroller of the Currency.

Of Counsel:

DAVID C. ACHESON,
United States Attorney.

Filed November 16, 1962

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Civil Action No. 1857-62

OFFICIAL TRANSCRIPT OF PROCEEDINGS

October 11, 1962.

MOTIONS & CROSS-MOTIONS FOR SUMMARY JUDGMENT AND MOTION TO DISMISS

[9] The Court will ask counsel on both sides to respond to the question of the Court as to whether there is any substantial question of fact involved in this case, or whether it is fully agreed by all that the question to be presented to the Court is strictly a question of law.

We all know if there is any substantial question of fact that is a bar to the Court proceeding in a motion for summary judgment.

Mr. Merrigan: We have filed in the case, as you probably know, Your Honor, statements under Rule 9(h) regarding certain differences we have with the facts relied upon by the intervening defendant for summary judgment.

The Court: Do you mean your construction of the legal effect of those facts?

Mr. Merrigan: Well, the legal effect and the facts as they are presented by the intervening defendant. I don't think there is any difference of fact at all between the plaintiffs and the defendant Comptroller, but I would be less than candid with the Court if I told you we didn't disagree most heartily with some of the material facts the intervening defendant has presented to the Court. In other words, they have made certain statements in their Rule 9(h), statement of material issues, material facts which are supposed to be without issue, which we do disagree with, and we have set them [10] out very specifically in our statement of disagreement.

Mr. Acheson: Your Honor, I would say as to that, there is no disagreement as to the facts between the intervening defendant and the plaintiffs, if by fact we mean an event,

something which occurred and can be reported; if we mean a conclusion which is drawn from that, there are different conclusions. These I submit and we have submitted in papers filed with Your Honor are mere conclusions of law, or conclusions to be drawn from undisputed facts. There are no facts as such which are in dispute. This is my assertion to Your Honor.

If Your Honor will glance through our reply to the paper filed by my learned opponent you will see in all respects I think except one these are really conclusions of law.

The one is a typographical error in which he states quite correctly that one of our papers cites a certain date and this is incorrect. That is quite true. We have made a correction of the error and aside from that I know of no event, no specific occasion, nothing which was done upon which there is any difference between us.

The Court: Can the Court properly construe the explanation of counsel for plaintiff as coinciding with the statement of counsel for defendant?

Mr. Merrigan: I would have to say again, and I have in mind most particularly the intervening defendant's contention [11] that the $650,000 payment which was drawn out of the funds of the Whitney National Bank of New Orleans transferred to the Holding Corporation and then put in the Whitney National Bank in Jefferson Parish was a dividend.

We say that this was a withdrawal of capital funds. It goes right to the heart of the case. We say we cannot agree it was a dividend. I think that is the major issue which I take issue with.

I also take issue with the fact that the two banks, the Bank in New Orleans and the bank in Jefferson Parish, are not going to be run by the same management because the Holding Corporation consists of the same officers and directors as those who manage the New Orleans bank, and they manage the Jefferson Bank.

These are issues which go right to the heart of this case.

Mr. Acheson: Your Honor, this is exactly what I was undertaking to state to Your Honor a moment ago. Whether a sum of money paid by one institution to its parent company is a dividend or not is a matter of law. There is no doubt about the fact and my learned opponent will not disagree with me that the money was paid as stated, that it purported to be a dividend, and that it went through all the motions of a dividend.

[12] Now, whether Your Honor will conclude, if it is relevant, which I think it is not, whether it was a dividend or not or some other kind of a payment, this is a conclusion to be drawn from the facts. There is no fact which a trial could change here as to whether it was or was not a dividend.

We all know what happened. We do not disagree about what happened. We disagree only about the name which is given to it and the significance of what was done.

The Court: The passage of this sum of money counsel for the plaintiff stated is an agreed fact. You are not disputing that this money passed. The question is as to the legal effect.

Mr. Merrigan: It goes a little deeper than that, Your Honor, because we submit, and our Rule 9(h), disagreement statement, that on the basis of the testimony of Mr. Keehn Berry himself, who is the president of the Whitney National Bank of New Orleans, sworn testimony, he said it was to be a withdrawal of capital funds and in this case we are going to contend that it was a withdrawal of capital funds and it is not in the manner of calling it a dividend or anything else.

The admitted facts, the statement of the defendant, the intervening defendant, are to the effect that it was a capital withdrawal. It came out of their undivided surplus account.

[13] Mr. Acheson: Your Honor, I think my distinguished friend here has settled the matter by what he just said. He said in fact it came out of the undivided profits account. It did. This is not a withdrawal of capital. This is a dividend. There is no dispute.

Mr. Merrigan: Of course, my very distinguished opponent will agree that undivided surplus of a bank is its capital account.

Mr. Acheson: Capital account is its capital account. Its undivided profit is its account out of which dividends are paid.

This is a matter which Your Honor can decide. You need no further testimony.

Mr. Merrigan: Indeed, that is so, but we say it is an issue.

Mr. Acheson: Surely it is an issue, but it is a conclusion and not a fact.

The Court: The Court is not quite persuaded it is an issue of fact. It seems to be an issue which is founded upon agreed statement of fact, and that would cause it, in the Court's humble judgment, to be an issue of law, if it is material.

Mr. Merrigan: I would agree with Your Honor if we can simply take the facts as Mr. Acheson has agreed they are: that it did come out of the surplus account and was transferred [14] from the Whitney National of New Orleans to the Holding Company and then directly to the bank in Jefferson.

Mr. Acheson: It came out of the undivided profits of the bank, surely.

The Court: Are there any other matters that might raise questions at this time?

The Court hears no affirmative response. The Court assumes it can proceed on the basis that there is no question of fact that would prevent motions for summary judgment from being heard.

Consequently, we will proceed and the Court understands it is agreed between counsel on both sides that counsel for the plaintiff, who is also one of the movants for a motion for summary judgment, is to make the opening argument. Is that correct?

Mr. Merrigan: Yes, Your Honor.

The Court: You may proceed, Mr. Merrigan.

Filed November 5, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

[Title omitted]

MEMORANDUM

On October 3, 1961, the Comptroller of the Currency gave preliminary approval to the formation of two new national banks, the Crescent City National Bank and the Whitney National Bank in Jefferson Parish, Louisiana, subject to approval by the Federal Reserve Board of the formation of a holding company for the purpose of acquiring the stock of such banks, pursuant to the Bank Holding Company Act of 1956. On May 3, 1962, the Federal Reserve Board approved the application of Whitney Holding Corporation to become a bank holding company by acquiring the stock of the above two mentioned banks. Subsequently, the Comptroller approved the consolidation of the existing Whitney National Bank in New Orleans into the Crescent City National Bank under the name of the Whitney National Bank in New Orleans and this was accomplished. The Holding Corporation, previously organized under Louisiana law, then completed the organization of the Whitney National Bank in Jefferson Parish by purchasing all of its stock for $650,000.00. At that time the Articles of Association and the Certificate of Organization of the Whitney National Bank in Jefferson Parish had already been executed and filed with the Comptroller. On June 9, 1962, just as the Comptroller was about to issue a Certificate of Authority to permit that Bank to commence business this suit was instituted praying for a declaratory judgment and an injunction prohibiting him from issuing said certificate.

A temporary restraining order was issued by this Court on June 27, 1962, followed by a temporary injunction which took effect on the same day on which the Louisiana State Legislature passed a statute making it unlawful ". . . for any bank holding company or subsidiary thereof to open for business whether or not the charter, permit, license or

certificate to open for business has already been issued." La. Act 275 3(5) of 1962. The Plaintiffs base their case on the contention that this statute is clearly applicable to the Whitney National Bank in Jefferson Parish and that the Defendant Comptroller may not issue a certificate of Authority to this bank in contravention of the law. While continuing this contention, the Plaintiffs urge the alternative contention that, apart from the above statute, the formation of this bank contravenes Section 36(c) of the National Banking Act, 12 U.S.C. 36(c), in combination with La. R.S. 6:45 which makes it unlawful for the Whitney National Bank in New Orleans to open a "branch" in Jefferson Parish, the Plaintiffs urging the Court to arrive at this determination by "piercing the corporate veil" of the holding company form used.

The Defendants, on the other hand, argue that Louisiana Act 275 is inapplicable to it, a national bank, but that, should the Court determine that it is applicable to the new bank, then it is unconstitutional in that it collides with the Supremacy Clause of the Constitution since it prohibits a national bank, which has been organized in compliance with the terms of the Federal Bank Holding Company Act of 1956 from commencing business in the State of Louisiana and thus is in excess of the regulatory power reserved to the states. The Defendants contend that the Whitney National Bank in Jefferson Parish is not a "branch" bank and therefore does not come within the proscription of Section 36(c) of the National Banking Act but is, on the contrary, an entity possessing the degree of separateness required by the terms of the Federal Bank Holding Company Act.

This matter is now before the Court on (1) the motion of Defendant Saxon, Comptroller of the Currency, for summary judgment; (2) the cross-motion of Plaintiff, Bank of New Orleans, for summary judgment; (3) the cross-motion of Defendant Saxon to dismiss; (4) the motion of the Intervening Defendant, Whitney National Bank in Jefferson Parish, for summary judgment; (5) the cross-motion of the Intervening Plaintiff, J. W. Jeansonne, Louisiana Bank Commissioner, for summary judgment. Upon consideration of these motions, the Points and Authorities submitted therewith, the Statements of Opposition filed thereto and the arguments advanced on hearing, and the Court being fully advised in the premises, the Court concludes, there being no genuine issue of material fact, as follows:

That the cross-motions for summary judgment raised by the Plaintiff, Bank of New Orleans and the Intervening Plaintiff, J. W. Jeansonne, State Bank Commissioner of the State of Louisiana, should be, and are, granted. Accordingly, the motions for summary judgment of the Defendant, James J. Saxon, Comptroller of the Currency and the Intervening Defendant, Whitney National Bank in Jefferson Parish are denied. Further, Defendant Saxon's cross-motion to dismiss is also denied.

The Certificate of Authority has not yet been issued by the Comptroller of the Currency to the Whitney National Bank in Jefferson Parish and there is no question that the Comptroller has no discretion to issue a certificate of authority to a new bank that will operate in a manner prohibited by law. *Commercial State Bank v. Gidney*, 174 F. Supp. 770,778, aff'd, 278 F.2d 871 (D.C. App. 1960); *Camden Trust Co. v. Gidney*, 301 F.2d 521 (D.C. App.), cert. denied, 369 U.S. 886 (1962). Louisiana Act 275 3(5) of 1962 reads as follows: "It shall be unlawful . . . for any bank holding company or subsidiary thereof to open for business, whether or not the charter, permit, license or certificate to open for business has already been issued." The Court rules that this statute is directly applicable to the proposed Defendant, Whitney National Bank in Jefferson Parish and that said statute makes it unlawful for said bank to commence business. Relying on the authority of *Bracburn Securities Corp. v. Smith*, 153 N.E. 2d 806, appeal dismissed for want of substantial Federal question, 359 U.S. 311 (1959) and *Opinion of the Justices*, 151 A. 2d 236 (N.H. 1959) upholding the constitutionality of similar state statutes, the Court rules that the passage of Louisiana Act 275 3(5) of 1962 was within the power reserved to the states under 12 U.S.C. Section 1846, the Federal Bank Holding Company Act.

The Court finds §1842(d) of said act persuasive of the degree of control that the states may bring to bear in this area. This Section essentially provides that, before an out-of-state bank holding company may come into another state and acquire an interest in a bank of that state, the state must specifically authorize it by statute. The cases relied on by the Defendants in support of their contention that this statute is unconstitutional do not concern themselves with the question of the permissible limits of state regulation of

national bank holding companies and their subsidiaries under §1846.

The Court having upheld the constitutionality of Louisiana Act 275 in its application to Defendant making it unlawful for said Defendant to open in Louisiana, the Court deems it unnecessary to address itself to the cogent arguments put forth by counsel on the question of the applicability of 12 U.S.C. 36(c) as to whether, by its terms, it proscribes in these circumstances, the setting up of the type of bank herein involved and secondly, if not proscribed by the terms of the statute, whether this Court ought to look behind the corporate form of the new bank to determine whether or not it is in violation of Section 36(c).

Counsel for the Plaintiff, Bank of New Orleans and Trust Company will prepare and submit findings of fact, conclusions of law and order in conformity with the Court's ruling.

/signed/ CHARLES F. MCLAUGHLIN,
Judge.

November 5, 1962.

Filed November 23, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

[Title omitted]

INTERVENING DEFENDANT'S OBJECTIONS TO THE FORM OF PLAINTIFFS' PROPOSED ORDER FOR SUMMARY JUDGMENT AND JUDGMENT.

Comes now the intervening defendant, Whitney National Bank in Jefferson Parish, and objects to the form of plaintiffs' Proposed Order for Summary Judgment and Judgment, submitted herein on November 21, 1962, and requests this Court to amend said Proposed Order for Summary Judgment and Judgment in the following respects:

1. The last paragraph beginning on page 2 of said Proposed Order for Summary Judgment and Judgment should be revised to read as follows:

"Ordered, Adjudged and Decreed, that defendant, James J. Saxon, Comptroller of the Currency, his agents, servants, employees and attorneys, be and they hereby are permanently restrained and enjoined from issuing or delivering any Certificate of Authority, pursuant to 12 U.S.C. §27 or otherwise, to intervening defendant Whitney National Bank in Jefferson Parish, so long as Whitney National Bank in Jefferson Parish remains a bank holding company subsidiary within the meaning of Louisiana Act 275 of 1962, or to any persons or corporations in active concert or participation with said Whitney National Bank in Jefferson Parish, authorizing the opening and operation by them or any of them of a bank or banking facilities within the limits of Jefferson Parish, State of Louisiana, in violation of Louisiana Act 275 of 1962, and it is further . . . ."

2. The first full paragraph on page 3 of said Order for Summary Judgment and Judgment should be stricken.

/s/ BRICE M. CLAGETT,
Attorney for Intervening Defendant
Whitney National Bank in
Jefferson Parish

November 23, 1962.

Filed November 23, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

[Title omitted]

MEMORANDUM IN SUPPORT OF INTERVENING DEFENDANT'S OBJECTIONS TO THE FORM OF PLAINTIFFS' PROPOSED ORDER FOR SUMMARY JUDGMENT AND JUDGMENT.

1. The Injunction Provision Is Unjustifiably Broad and Must Be Amended To Conform to the Court's Decision As Contained in Its Memorandum Opinion Filed November 5, 1962.

The proposed Order, as drafted by plaintiffs, would seem to prohibit the Comptroller from granting a certificate to Whitney National Bank in Jefferson Parish even in a situation in which the opening of that bank for business would be perfectly legal under Louisiana law. The proposed Order thus goes far beyond the decision of the Court, as stated in its Memorandum Opinion filed November 5, 1962, and must be revised to conform to that decision.

The Court has held that the Comptroller may not grant a certificate to commence a banking business to Whitney National Bank in Jefferson Parish on the ground that Whitney-Jefferson could not commence a banking business in Jefferson Parish, Louisiana, without violating Louisiana Act 275 of 1962. Section 3(5) of that statute provides that "no bank holding company or subsidiary thereof" may open for business any bank not already open for business on the effective date of the statute. Whitney-Jefferson is presently a bank holding company subsidiary within the meaning of Section 1(g) of the statute.

If, however, the ownership of Whitney-Jefferson changed so that it ceased to be a bank holding company subsidiary as that term is used in the Louisiana statute, the prohibition against its opening would no longer apply and so far as has been decided by this Court, Whitney-Jefferson would be free to open for business and the Comptroller would be free to issue his certificate. Any claim that Whitney-Jefferson

would still be prohibited from opening for business even after it ceased to be a bank holding company subsidiary would represent an attempt to extend the decision of this Court to matters which it has expressly refrained from deciding.

The proposed injunction paragraph, beginning at the bottom of page 2 of plaintiffs' proposed Order, is inconsistent with these obvious facts. Read literally, that paragraph would appear to enjoin the Comptroller from issuing his certificate to Whitney-Jefferson *even if Whitney-Jefferson ceased to be a bank holding company subsidiary.* Read literally, therefore, this paragraph would seem to enjoin the Comptroller from chartering Whitney-Jefferson even if Whitney-Jefferson's ownership had changed so that its opening was no longer illegal under the Louisiana statute. The injunction paragraph is therefore indefensibly broad and inconsistent with the decision of the Court as contained in its Memorandum Opinion filed on November 5, 1962.

The defect can be cured by revising plaintiffs' Proposed Order and Judgment as shown in paragraph 1 of intervening defendant's Objections, filed herein on November 23, 1962. Intervening defendant's proposed revisions ensure that (1) the Comptroller is enjoined from issuing a certificate to Whitney-Jefferson so long as Whitney-Jefferson remains a bank holding company subsidiary within the meaning of the Louisiana statute, and (2) the Comptroller is enjoined from issuing a certificate to persons or corporations "in active concert or participation with" Whitney-Jefferson if the opening of a bank by them in Jefferson Parish would violate the Louisiana statute.

2. Plaintiffs Are Not Entitled to the Cancellation of Their Bond, and Such Bond Should Be Retained To Secure Intervening Defendant Against Damages Incurred by It in the Event That It is Ultimately Determined That Plaintiffs Acted Wrongfully in Obtaining a Preliminary Injunction.

The first full paragraph on page 3 of plaintiffs' Proposed Order for Summary Judgment and Judgment provides for cancellation of the $50,000 bond filed herein by one of the plaintiffs, as principal, and Glens Falls Insurance Company, surety, on July 16, 1962. This provision of the proposed Order is unjustified and should be stricken.

Fed. R. Civ. P. 65(c), which provides for the giving of a bond by a party seeking a preliminary injunction, does not provide for its automatic or necessary cancellation in the event that a permanent injunction is subsequently granted. If it is determined on appeal that the preliminary injunction was wrongfully granted and that intervening defendant has suffered damage thereby, then intervening defendant would become entitled to collect on the bond to the extent of such damages. This was precisely the situation in *Houghton* v. *Meyer*, 208 U.S. 149 (1908), where the Supreme Court ruled in favor of the position here taken, and allowed a party which had lost at trial, but had won on appeal, to collect damages on a preliminary injunction bond.

The arguments for maintaining the bond in effect are unusually strong in the present case, where (1) substantial questions of law will be determined on appeal, and (2) the Louisiana statute which this Court has held determinative of the litigation had not even been enacted at the time the preliminary injunction (on which the bond was given) was entered.

Other authorities support the position here taken. "Until there has been a final determination of the suit in which the bond is given, it cannot be definitely ascertained as to whether or not there is or will be any liability on the bond." 14 R.C.L. 74-75. If a plaintiff obtains a preliminary injunction and gives security, and subsequently obtains a permanent injunction or other judgment, but judgment for the plaintiff is reversed on appeal, the defendant is entitled to collect on the bond. *Beech* v. *United States Fidelity & Guaranty Co.*, 30 P.2d 1079 (Idaho, 1934); *Williams* v. *Baker*, 13 Ohio C.C. 500, 92 A.L.R. 274 (1896).

The penultimate paragraph of plaintiffs' Proposed Order for Summary Judgment and Judgment should therefore be deleted.

Respectfully submitted,

s BRICE M. CLAGETT,
Attorney for intervening defendant
Whitney National Bank in Jefferson Parish.

November 23, 1962.

Filed November 26, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

[Title omitted]

DEFENDANT COMPTROLLER'S OBJECTIONS TO FORM OF PROPOSED ORDER FOR SUMMARY JUDGMENT AND JUDGMENT AS SUBMITTED BY PLAINTIFFS.

On November 21, 1962, plaintiffs submitted a proposed "Order for Summary Judgment and Judgment" for the Court's consideration in this case.

The defendant Comptroller objects to the form of the fifth paragraph of that proposed order (set forth at the bottom of page 2 and at the top of page 3 as submitted by plaintiffs), and proposes that said paragraph be amended to read as follows (new matter being underlined):

> "Ordered, adjudged and decreed, that defendant, James J. Saxon, Comptroller of the Currency, his agents, servants, employees and attorneys, be and they hereby are permanently restrained and enjoined from issuing or delivering any Certificate of Authority, pursuant to 12 U.S.C. §27 or otherwise, to intervening defendant Whitney National Bank in Jefferson Parish, *so long as Whitney National Bank in Jefferson Parish remains a bank holding company subsidiary within the meaning of Louisiana Act 275 of 1962*, or to any persons or corporations in active concert or participation with said Whitney National Bank in Jefferson Parish, authorizing the opening and operation by them or any of them of a bank or banking facilities within the limits of Jefferson Parish, State of Louisiana, *in violation of Louisiana Act 275 of 1962*, and it is further"

The defendant Comptroller takes no position with respect to inclusion or exclusion of the sixth paragraph of the proposed order (set forth as the first full paragraph on page 3 as submitted by plaintiffs), dealing with cancellation of the

injunction undertaking and discharge of the principal and surety from further liability thereon.

JOSEPH D. GUILFOYLE,
Acting Assistant Attorney General.

DONALD B. MACGUINEAS,
PAUL J. GROMBLY,
DAVID V. SEAMAN,
Attorneys, Department of Justice
Attorneys for Defendant
Comptroller of the Currency.

Of Counsel:

DAVID C. ACHESON,
United States Attorney.

Filed December 5, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT OF DECLARATORY JUDGMENT AND PERMANENT INJUNCTION.

This is an action by the Bank of New Orleans and Trust Company and Guaranty Bank and Trust Company, Lafayette, Louisiana against James J. Saxon, Comptroller of the Currency, seeking a Declaratory Judgment and an Injunction prohibiting the defendant from issuing to the Whitney National Bank in Jefferson Parish a Certificate of Authority to commence the business of banking in Jefferson Parish, Louisiana. A temporary restraining order was issued by this Court on June 27, 1962. Thereafter, the motion of the Whitney National Bank in Jefferson Parish to intervene as a defendant, which had been filed on June 19, 1962 was granted, and the Bank of Louisiana in New Orleans intervened as a plaintiff. On July 10, 1962, the Court issued a Preliminary Injunction against the defendant. J. W. Jeansonne, Louisiana State Bank Commissioner, thereupon intervened as a plaintiff.

Motions and cross-motions for Summary Judgment by all parties and defendant Comptroller's motion to dismiss having come on for hearing on October 10, 1962, and the Court having considered the pleadings herein, the statements of material facts submitted by the parties, the points and authorities submitted therewith, the affidavits submitted by the parties, and having heard oral arguments of counsel, and the Court, having concluded that there are no genuine issues of fact involved in this case requiring a trial on the merits and that plaintiffs' and intervening plaintiffs' cross-motions for summary judgment should be granted for the reasons set forth in the Court's Memorandum Decision, dated November 5, 1962, hereby makes the following findings of fact and conclusions of law:

Findings of Fact

1. Plaintiffs, Bank of New Orleans and Trust Company and Guaranty Bank and Trust Company, Lafayette, Louisiana, and intervening plaintiff, Bank of Louisiana in New Orleans, are banking corporations organized and existing under the laws of the State of Louisiana. Plaintiffs, Bank of New Orleans and Trust Company and Bank of Louisiana in New Orleans, conduct their banking business within the Parish of Orleans, Louisiana. Plaintiff, Guaranty Bank and Trust Company of Lafayette, Louisiana conducts its banking business in the Parish of Lafayette, Louisiana.

2. J. W. Jeansonne, Louisiana State Bank Commissioner, intervening plaintiff, is the officer charged with the administration of the banking laws of the State of Louisiana, including Louisiana Act 275 of 1962.

3. Defendant, James J. Saxon, is the Comptroller of the Currency, an officer of the United States authorized by law to issue Certificates of Authority to national banking associations which are lawfully entitled to commence the business of banking.

4. Intervening defendant, Whitney National Bank in Jefferson Parish (Whitney-Jefferson), is a national banking association and a wholly owned subsidiary of Whitney Holding Corporation (Whitney Holding), a bank holding company incorporated under the laws of Louisiana.

5. Whitney National Bank of New Orleans (Whitney-New Orleans), not a party to this suit, is also a national banking

association and a wholly owned subsidiary of Whitney Holding.

6. Whitney-New Orleans, created approximately 79 years ago, is the largest bank in Louisiana and one of the largest financial institutions in the southern portion of the United States, and presently conducts its business only in Orleans Parish (a political subdivision coterminous with the City of New Orleans).

7. For a long period of years, Whitney-New Orleans has been desirous of expanding its banking operations into Jefferson Parish, Louisiana, a neighboring parish or county, but was prohibited by the operation of 12 U.S.C. §36(c) and Louisiana Revised Statutes, Title 6, §54, from establishing branch facilities outside of Orleans Parish. In an effort to accomplish its desired objective, Whitney-New Orleans decided to utilize the device of a bank holding company.

8. The management of Whitney-New Orleans thereupon obtained from the Comptroller of the Currency informal approval of its desire to expand banking operations into Jefferson Parish through the formation of a bank holding company and set into motion the following proposed steps designed to accomplish such purpose:

First: With $350,000. of its funds, Whitney-New Orleans created Whitney Holding, and distributed the 5,600 shares it received in Whitney Holding to its stockholders.

Second: Whitney Holding invested the $350,000. provided by Whitney New Orleans in a new national banking association, Crescent City National Bank, and received in return all of the shares of stock in Crescent City National Bank.

Third: Whitney New Orleans, Crescent City National Bank and Whitney Holding then entered into an agreement whereby Whitney-New Orleans was consolidated into Crescent City National Bank under the name Whitney-New Orleans, and Whitney Holding became the owner of all of the shares in the consolidated banks and the stockholders of the original Whitney-New Orleans received the remainder of the stock in Whitney Holding.

Fourth: Whitney New Orleans then provided $650,000. to Whitney Holding with which to purchase all of the stock in Whitney-Jefferson.

9. On October 3, 1961, defendant Comptroller gave preliminary approval to the formation of the Crescent City National Bank and the Whitney National Bank in Jefferson

Parish, Louisiana, subject to approval by the Federal Reserve Board of the application of Whitney Holding to become a bank holding company under the Bank Holding Company Act of 1956.

10. On May 3, 1962, the Federal Reserve Board approved the application of Whitney Holding.

11. Subsequently, defendant Comptroller then approved the consolidation of the existing Whitney-New Orleans into the Crescent City National Bank under the original name of Whitney-New Orleans, and this was accomplished.

12. Whitney Holding thereupon purchased all of the stock of Whitney-Jefferson for $650,000., by which time the Articles of Association and the Certificate of Organization of Whitney-Jefferson had been executed and filed with defendant Comptroller.

13. On June 9, 1962, before defendant Comptroller could issue a Certificate of Authority authorizing Whitney-Jefferson to commence the business of banking in Jefferson Parish, Louisiana, this suit was instituted.

14. Defendant Comptroller voluntarily withheld issuance of a Certificate of Authority until June 27, 1962, when a temporary restraining order was issued by this Court. After hearing, a preliminary injunction was ordered granted on July 6, 1962, and was signed and filed on July 10, 1962.

15. On the same date, July 10, 1962, Louisiana Act 275 of 1962 became effective as the law of Louisiana. Section 3(5) of said Act provides:

> "It shall be unlawful . . . . (5) for any bank holding company or subsidiary thereof to open for business any bank not now opened for business, whether or not a charter, permit, license or certificate to open for business has already been issued."

16. Plaintiffs and intervening plaintiffs contend that Act 275 of 1962 is clearly applicable to Whitney Jefferson; was enacted pursuant to the power reserved to the states under 12 U.S.C. §1846 (the Federal Bank Holding Company Act); and that defendant Comptroller may not issue a Certificate of Authority to a wholly owned subsidiary of a bank holding company in contravention of this statute. Defendant and intervening defendant, on the other hand, contend that Section 3(5) of Act 275 of 1962 is inapplicable to Whitney-Jefferson; but that, should the Court determine that such

section be applicable to Whitney-Jefferson, then it is unconstitutional in that it collides with the Supremacy Clause of the Constitution, in that said Section 3(5) of the Louisiana statute exceeds the power reserved to the states in the Federal Bank Holding Company Act.

17. Plaintiffs and intervening plaintiffs urge the alternative contention that, apart from the above statute, the issuance by defendant Comptroller of the Certificate of Authority to Whitney-Jefferson would also be in contravention of Section 36(c) of the National Banking Act, 12 U.S.C. §36(c) in combination with Louisiana R.S. 6:54, which makes it unlawful for Whitney-New Orleans to open a "branch" in Jefferson Parish, and plaintiffs and intervening plaintiffs ask the Court to arrive at this determination by "piercing the corporate veil" of the holding company form used. Defendant and intervening defendant, on the other hand, argue that Whitney-Jefferson is not a "branch" bank and therefore does not come within the proscription of Section 36(c) of the National Banking Act, but is, on the contrary, a separate entity which has been organized and established and will operate differently than a branch of Whitney-New Orleans.

18. Plaintiffs and intervening plaintiffs have presented sworn, uncontroverted facts to show that, if defendant Comptroller is not prohibited from issuing his Certificate of Authority to Whitney-Jefferson, each plaintiff bank will sustain irreparable injury and damage in excess of $10,000, exclusive of interest and costs.

Conclusions of Law

1. The Court has jurisdiction over this action under 28 U.S.C. §1331, and under the provisions of Sections 11-305, 306 of the District of Columbia Code, and is empowered to render a declaratory judgment herein under the provisions of 28 U.S.C. §2201.

2. Defendant Comptroller of the Currency has no discretion to issue a Certificate of Authority to a national banking association to commence a banking business in a manner prohibited by law (*Commercial State Bank* v. *Gidney*, 174 F. Supp. 770, 778, aff'd. 278 F. 2d 871 (D.C. App. 1960); *Camden Trust Co.* v. *Gidney*, 301 F. 2d 521 (D.C. App.), cert. denied, 369 U.S. 886 (1962); *Wayne Oakland Bank* v. *Gidney*, 252 F. 2d 537 (C.C.A. 6), cert. denied 358 U.S. 830 (1958)).

3. The Federal Bank Holding Company Act, at 12 U.S.C. §1846, reserved to the States such powers and jurisdiction as they had or might exercise in the future with respect to banks, bank holding companies and subsidiaries of bank holding companies, and Section 3(5) of Louisiana Act 275 of 1962 was enacted pursuant to and within the scope of the said powers and jurisdiction so reserved to the States by Congress, and said statute is constitutional (*Braeburn Securities Corp.* v. *Smith*, 153 N.E. 2d 806, appeal dismissed for want of a substantial Federal question, 359 U.S. 311 (1959); *Opinion of the Justices*, 151 A. 2d 236 (N.H., 1959); also 12 U.S.C. §1842(d), *Federal Bank Holding Company Act*)).

4. Act 275 of 1962 is directly applicable to intervening defendant, Whitney National Bank in Jefferson Parish, a wholly owned subsidiary of a Louisiana-incorporated bank holding company, and said statute makes it unlawful for said intervening defendant to commence the business of banking in Louisiana. Accordingly, defendant Comptroller of the Currency should be permanently enjoined and restrained from issuing a Certificate of Authority licensing Whitney-Jefferson to commence such unlawful operations (*Commercial State Bank* v. *Gidney*, *supra*; *Wayne Oakland Bank* v. *Gidney*, *supra*).

5. Plaintiff and intervening plaintiff banks, faced with proposed invasion of property rights and injury from the proposed unlawful issuance by defendant Comptroller of a Certificate of Authority to intervening defendant Whitney-Jefferson, have standing to bring this suit, and they have no other adequate remedy at law (*Wisconsin Bankers Association* v. *Robertson*, 190 F. Supp. 90, 94, aff'd. 294 F. 2d 714 (App. D.C.), cert. denied 368 U.S. 938, rehearing denied 368 U.S. 979 (1961); *Commercial State Bank* v. *Gidney*, *supra*; *Wayne Oakand Bank* v. *Gidney*, *supra*.)

6. The Court, having upheld the constitutionality of Louisiana Act 275 of 1962 in its application to intervening defendant making it unlawful for said defendant to open for business in Louisiana, it is unnecessary for the Court to address itself to the other contentions of the parties on the question of the applicability of 12 U.S.C. 36(c), and as to whether, by its terms, it proscribes in these circumstances, the setting up of the type of bank here involved, and secondly, if not proscribed by the terms of the statute, whether this Court ought to look behind the corporate form of

Whitney-Jefferson to determine whether or not it is in violation of Section 36(c).

7. The cross motions for summary judgment of plaintiffs and intervening plaintiff should be and are granted; and the motions for summary judgment of the defendant and intervening defendant and the cross motion to dismiss by defendant Comptroller should be, and are, denied.

Done this 5 day of December, 1962.

s/ CHARLES F. MCLAUGHLIN,
Judge.

Filed December 5, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

[Title omitted]

ORDER

This cause came on to be heard on motions of the defendant and intervening defendant for summary judgment and cross-motions of plaintiffs and intervening plaintiffs for summary judgment, all filed pursuant to Rule 56 of the Federal Rules of Civil Procedure, and upon defendant's motion to dismiss, and the Court having considered the pleadings, the affidavits submitted in support of the motions and cross-motions, the statements of material facts submitted by the parties pursuant to Local Rule 9(h), and having heard oral arguments of counsel, and the Court, having concluded there are no genuine issues of fact involved in this case requiring a trial on the merits, and, it appearing to the Court after due deliberation that the plaintiffs' and intervening plaintiffs' cross-motions for summary judgment should be granted for the reasons set forth in the Court's Memorandum Opinion, dated November 5, 1962, and that it would be unlawful for defendant Comptroller of the Currency to issue a Certificate of Authority authorizing intervening defendant Whitney National Bank in Jefferson Parish to open and operate proposed banking facilities in Jefferson Parish, State of Louisiana to the irreparable injury and damage of the

plaintiffs and intervening plaintiffs herein, and that defendant should be permanently enjoined from so doing, and the Court having made and filed its findings of fact and conclusions of law, it is this — day of December, 1962:

Ordered, That defendant's and intervening defendant's motions for summary judgment and defendant's motion to dismiss be, and the same hereby, are denied, and it is further

Ordered, That plaintiffs' and intervening plaintiffs' cross-motions for summary judgment be, and the same hereby, are granted, and it is further

Ordered, Declared, Adjudged and Decreed, That defendant Comptroller of the Currency has no discretion to and may not issue a Certificate of Authority to intervening defendant Whitney National Bank in Jefferson Parish licensing and authorizing said intervening defendant to open and operate a banking business in Jefferson Parish, State of Louisiana, in violation of Louisiana Act 275 of 1962, the enactment of which by the State of Louisiana was authorized by the Federal Bank Holding Company Act, 12 U.S.C. §1846, and it is further

Ordered, Adjudged and Decreed, That defendant, James J. Saxon, Comptroller of the Currency, his agents, servants, employees and attorneys, be and they hereby are permanently restrained and enjoined from issuing or delivering any Certificate of Authority, pursuant to 12 U.S.C. §27 or otherwise, to intervening defendant Whitney National Bank in Jefferson Parish as a bank holding company subsidiary within the meaning of Louisiana Act 275 of 1962, or to any persons or corporations in active concert or participation with said Whitney National Bank in Jefferson Parish, authorizing the opening and operation by them or any of them of a bank or banking facilities within the limits of Jefferson Parish, State of Louisiana in violation of Louisiana Act 275 of 1962, and it is further

Ordered, Adjudged and Decreed, That the injunction undertaking in the sum of $50,000, filed herein on July 16, 1962 in support of the preliminary injunction by plaintiff, Bank of New Orleans and Trust Company, principal, and Glens Falls Insurance Company, surety, be and the same hereby is cancelled and said principal and surety on such bond be and the same hereby are discharged of any further liability thereon, and it is further

Ordered, Adjudged and Decreed, That plaintiffs and in-

tervening plaintiffs shall have and recover their costs from the intervening defendant herein.

/s/ CHARLES F. MCLAUGHLIN,
Judge.

Filed January 31, 1963

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1857-62

[Title omitted]

NOTICE OF APPEAL

Notice is hereby given that Whitney National Bank in Jefferson Parish, the intervening defendant above named, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the order entered in this action on December 5, 1962, denying defendant's and intervening defendant's motions for summary judgment and defendant's motion to dismiss, granting plaintiff's and intervening plaintiff's cross-motions for summary judgment, ordering that defendant Comptroller of the Currency may not issue a certificate of authority to intervening defendant, permanently enjoining such issuance, discharging an undertaking and awarding costs.

/s/ W. GRAHAM CLAYTOR, JR.
Attorney for Appellant
Whitney National Bank in
Jefferson Parish
701 Union Trust Building
Washington 5, D. C.

January 31, 1963.

Filed February 1, 1963

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil No. 1857-62

BANK OF NEW ORLEANS, *Plaintiff*,

vs.

JAMES J. SAXON, Comptroller of the Currency, *Defendant*.

NOTICE OF APPEAL

Notice is hereby given this 1st day of February, 1963, that defendant, James J. Saxon, Comptroller of the Currency, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 5th day of December, 1962, in favor of plaintiff against said defendant, James J. Saxon.

s DAVID C. ACHESON,
United States Attorney.

Copy to: Edward L. Merrigan, Esquire,
425 13th Street, N.W.,
Washington, D. C.
Attorney for Plaintiff.

(6468-3)

454 In United States Court of Appeals for the District of Columbia Circuit

[File endorsement omitted]

No. 17672

WHITNEY NATIONAL BANK IN JEFFERSON PARISH, APPELLANT

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL., APPELLEES

No. 17681

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY, APPELLANT

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL., APPELLEES

Appeals from the United States District Court for the District of Columbia

Decided August 14, 1963

455 *Mr. Dean Acheson*, with whom *Messrs. W. Graham Claytor, Jr.*, and *Brice M. Claggett* were on the brief, for appellant in No. 17672.

Mr. David L. Rose, Attorney, Department of Justice, with whom *Messrs. David C. Acheson*, United States Attorney, and *Joseph D. Guilfoyle*, Director of Operations, Civil Division, Department of Justice, and *Morton Hollander*, Attorney, Department of Justice, were on the brief, for appellant in No. 17,681.

Mr. Edward L. Merrigan for appellee Bank of New Orleans and Trust Company and certain other appellees.

Mr. Bentley G. Byrnes, with whom *Mr. Edward L. Merrigan* was on the brief, for appellee Louisiana State Bank Commissioner.

Mr. James F. Bell filed a brief on behalf of the National Association of Supervisors of State Banks, as *amicus curiae*, urging affirmance.

729-366 64 —1

OPINION—AUGUST 14, 1963

Before WILBUR K. MILLER, WASHINGTON AND DANAHER, *Circuit Judges.*

WILBUR K. MILLER, Circuit Judge: The City of New Orleans, Louisiana, is conterminous with the Parish of Orleans in which it is located. It is south of and adjacent to that part of Jefferson Parish which lies east of the Mississippi River. The latter is a populous area, already commercially and industrially active, in which further development is expected to be rapid and extensive.

The Whitney National Bank of New Orleans, by far the largest bank in Louisiana, with its main office and numerous branches in Orleans Parish, draws a substantial volume of business from customers in east Jefferson Parish. For some time it has desired to extend its operations into that area, but cannot establish branches therein because a Louisiana
456 statute,[1] which is construed as forbidding such expansion by state banks, is made applicable to national banks in Louisiana by a federal statute.[2]

After several years of studying alternate methods of doing indirectly what these statutes prohibited it from doing directly, The Whitney National Bank of New Orleans finally decided upon a corporate reorganization, the details of which included the formation of a holding company to own two new na-
457 tional banks: Crescent City National Bank, a mere conduit to exist temporarily in name only, and Whitney National Bank in Jefferson Parish, to be operated as we shall describe. All three new organizations were to be financed with funds furnished by Whitney of New Orleans.

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[1] 2 LSA-R.S. 6:54 (1951).

[2] Title 12 U.S.C. § 36 provides in pertinent part:

"*Branch Banks.*

"The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:

* * * * * *

"(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within

Through elaborate maneuvers which will be explained later, the result would be that Whitney Holding Corporation would own all the stock, except qualifying shares, of Whitney of New Orleans and Whitney in Jefferson Parish; and the shares of Whitney Holding Corporation would be owned by the shareholders of the original Whitney of New Orleans in the same proportion as before. The holding company feature of the plan required the approval of the Board of Governors of the Federal Reserve System, and the remainder of it required the approval of the Comptroller of the Currency.

Commenting on the proposed plan Whitney's president on October 28, 1961, advised his shareholders it had been decided to use the holding company device instead of the "affiliated" bank plan which we approved in the *Camden Trust* case[1] largely because, under the latter arrangement, it is impossible to attain and preserve identity of ownership of the two banks. He said:

> ". . . From the depositors [*sic*] point of view, those in the smaller bank will be assured of the same management which directs the larger one without possibility of interruption. They will be assured of access to the large loan limits of the combined banks. They will have the security which arises out of the fact that the large and

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the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. . . .

* * * * * *

"(e) No branch of any national banking association shall be established . . . without first obtaining the consent and approval of the Comptroller of the Currency.

"(f) The term 'branch' as used in this section shall be held to include *any branch bank, branch office, branch agency, additional office, or any branch place of business* located in any State . . . at which deposits are received, or checks paid, or money lent." [Emphasis supplied.]

[1] Camden Trust Company v. Gidney, 112 U.S. App. D.C. 197, 301 F. (2d) 521, *cert. denied* 369 U.S. 886 (1962).

the small bank have identical ownership as well as management.

"We . . . elected to use a holding company rather than to get a group of stockholders to form an
458 affiliate in Jefferson Parish. An affiliate by law must depend on ownership of a majority of the stock in the Jefferson Parish bank by Whitney Bank stockholders. Affiliate relationship can be suddenly terminated if stock ownership in the Jefferson Parish bank changes over a period of time until control ceases to be in the stockholders of the large New Orleans bank. This large bank cannot control those changes in stock ownership, and under the law when the control ceases to be in the stockholders of the large bank the two banks cannot have common officers or directors. As we view it, the change of ownership of the stock could be very embarrassing to either or both banks,—even to the extent of having a bank which we no longer control still bearing the name 'Whitney National Bank.'

"Under the holding company approach the relationship is completely owned by the stockholders of the holding company who will be all the present stockholders of the Whitney National Bank and their successors.

"By reason of the common ownership of the two banks in a holding company there can arise no conflict of interest between them as there can between affiliated banks. There will be no minority stockholders to be affected.

"From the customer point of view there will be no conflict of interest arising out of the manner in which the customer sees fit to divide his business between the commonly owned banks in the two parishes. He will have the full benefit of a relationship with the large bank and its officers.

"Because of the permanent relationship between the large and the smaller bank, the smaller one can operate safely with a small capitalization."

This plan was carried out almost completely. Whitney of New Orleans organized the Whitney Holding Corporation with $350,000 initial capital furnished by it, with which Whit-
459 ney Holding acquired the "phantom" [4] Crescent City National Bank. The Whitney Bank then by consolidation transferred its assets to Crescent City National Bank (owned by Whitney Holding) and immediately changed Crescent City's name to The Whitney National Bank of New Orleans. Then the new Whitney of New Orleans furnished the Holding Corporation with $650,000 [5] with which the latter organized The Whitney National Bank in Jefferson Parish. And all the Holding Corporation's capital stock was distributed proportionately to the stockholders of the original Whitney of New Orleans.

All this was done with the approval of the Board of Governors of the Federal Reserve System (which had the duty of passing on the validity of the holding company arrangement) and of the Comptroller of the Currency. The only step not yet taken is the Comptroller's issuance to The Whitney National Bank in Jefferson Parish of a Certificate of Authority which will enable it to begin business.

On June 9, 1962, three Louisiana state banks [6] filed
460 this suit against the Comptroller of the Currency, James J. Saxon, in the United States District Court for the District of Columbia. Their complaint, after describing Whitney's plan of reorganization and the various steps already taken pursuant to it, alleged that the Comptroller

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[5] This payment was described as a dividend.

[4] It was so characterized by the Federal Reserve Board of Governors. Crescent City never opened for business and was not intended to do so.

[6] Bank of New Orleans and Trust Company, located in Orleans Parish, Merchants Trust and Savings Bank, located in the eastern portion of Jefferson Parish, and Guaranty Bank and Trust Company, located in Lafayette Parish.

On June 26, 1962, Merchants Trust and Savings Bank moved, in its own behalf only, to dismiss the action and so withdrew as a party plaintiff. The Bank of Louisiana in New Orleans was allowed to intervene as a plaintiff on July 5, and on July 10 intervention of Whitney of Jefferson Parish as a defendant was permitted. On September 7, 1962, the State Bank Commissioner was allowed to intervene as a plaintiff. The District Court on September 26, 1962, granted the motion of National Association of Supervisors of State Banks for permission to appear as *amicus curiae*.

"(19.) . . . is presently considering almost immediate issuance of his Certificate or Certificates of Authority which will enable the new branch bank facility to open and commence to operate a banking business at one or more locations in Jefferson Parish under the name of Whitney National Bank of Jefferson Parish.

"(20.) Plaintiffs verily believe that defendant, unless enjoined, will, without any notice of intention to plaintiffs, issue in the name of Whitney National Bank of New Orleans, or Whitney Holding Corporation, or Whitney National Bank of Jefferson Parish the aforesaid Certificate or Certificates of Authority, all in contravention of the letter, intent and purposes of *Title 12 U.S.C. §§ 27, 36 and 1841, et seq.*, and that after said Certificate or Certificates are issued as aforesaid, plaintiffs will have no adequate remedy at law, either to compel revocation of same or to prevent the Whitney Bank from so operating in Jefferson Parish.

"(21.) Plaintiffs further allege that the unlawful and arbitrary issuance by defendant of his certificate or certificates, authorizing the Whitney National Bank to open and operate a new branch facility or facilities in Jefferson Parish as aforesaid will cause great and irreparable damage to the banking business of said plaintiffs . . . ."

The relief prayed for was a declaration that 12 U.S.C. §§ 27, 36 and 1841, *et seq.*, prohibit the Comptroller from issuing a Certificate of Authority to the newly-organized Whitney-Jefferson bank, and that he be preliminarily and permanently enjoined

". . . from issuing to the Whitney National Bank, also known by the name of Crescent City National Bank, the Whitney Holding Corporation and/or
461 the Whitney National Bank of Jefferson Parish, a Certificate or Certificates of Authority authorizing the establishment of new branch bank facilities by them or any of them in the name of Whitney National Bank or otherwise in Jefferson Parish, State of Louisiana . . . ."

After the complaint was filed, the Comptroller at first voluntarily withheld issuance of a Certificate of Authority to Whitney-Jefferson, but later indicated he would do so no longer. As a consequence, the plaintiffs moved for a temporary restraining order which was issued by District Judge Hart June 27, 1962; and on July 10, 1962, District Judge Holtzoff entered a preliminary injunction in accordance with the prayer of the complaint.

Meanwhile the Louisiana legislature of 1962 adopted a State Bank Holding Company Act, being Act 275,[1] which the Governor designated as emergency legislation so that it became effective July 10, 1962. Section 3(5) of that Act (6:1003(5)) is in pertinent part as follows:

> "It shall be unlawful:
>
> * * * * *
>
> "(5) for any bank holding company or subsidiary thereof to open for business any bank not now opened for business, whether or not, a charter, permit, license or certificate to open for business has already been issued. . . ."

Admittedly, this measure was passed to prohibit the opening of Whitney-Jefferson.

Numerous pleadings, affidavits and other documents were filed by the various parties, including the opinion of the Board of Governors of the Federal Reserve System approving Whitney Holding Corporation's acquisition of the Whitney National Bank of New Orleans, as reorganized, and Whitney National Bank in Jefferson Parish, and Governor Robertson's dissent from that action.

462 Cross motions for summary judgment, the Comptroller's motion to dismiss, and the plaintiffs' motion for a permanent injunction came on for hearing before District Judge McLaughlin on October 10, 1962. He filed a memorandum opinion holding that Louisiana Act 275, § 3(5) makes it unlawful for Whitney-Jefferson to commence business, and that the Comptroller should be enjoined from issuing to it a Certificate of Authority to open its doors. Having so concluded,

[1] Now codified as 2 LSA-R.S. 6:1001-1006 (1962 Supp.).

Judge McLaughlin deemed it unnecessary to consider whether the establishment of Whitney-Jefferson violated 12 U.S.C. § 36(c). His opinion is reported in 211 F. Supp. 576 (1962).

Findings of fact and conclusions of law were filed by Judge McLaughlin December 5, 1962. The findings include the following:

"4. Intervening defendant, Whitney National Bank in Jefferson Parish (Whitney-Jefferson), is a national banking association and a wholly owned subsidiary of Whitney Holding Corporation (Whitney Holding), a bank holding company incorporated under the laws of Louisiana.

"5. Whitney National Bank of New Orleans (Whitney-New Orleans), not a party to this suit, is also a national banking association and a wholly owned subsidiary of Whitney Holding.

"6. Whitney-New Orleans, created approximately 79 years ago, is the largest bank in Louisiana and one of the largest financial institutions in the southern portion of the United States, and presently conducts its business only in Orleans Parish (a political subdivision coterminous [*sic*] with the City of New Orleans).

"7. For a long period of years, Whitney-New Orleans has been desirous of expanding its banking operations into Jefferson Parish, Louisiana, a neighboring parish or county, but was prohibited by the operation of 12 U.S.C. § 36(c) and Louisiana Revised Statutes, Title 6, § 54, from establishing branch facilities outside of Orleans Parish. In an effort to accomplish its desired ob-
463 jective Whitney-New Orleans decided to utilize the device of a bank holding company.

"8. The management of Whitney-New Orleans thereupon obtained from the Comptroller of the Currency informal approval of its desire to expand banking operations into Jefferson Parish through the formation of a bank holding company and set into motion the following proposed steps designed to accomplish such purpose:

"*First:* With $350,000. of its funds, Whitney-New

Orleans created Whitney Holding, and distributed the 5,600 shares it received in Whitney Holding to its stockholders.

"*Second:* Whitney Holding invested the $350,000. provided by Whitney-New Orleans in a new national banking association, Crescent City National Bank, and received in return all of the shares of stock in Crescent City National Bank.

"*Third:* Whitney-New Orleans, Crescent City National Bank and Whitney Holding then entered into an agreement whereby Whitney-New Orleans was consolidated into Crescent City National Bank under the name Whitney-New Orleans, and Whitney Holding became the owner of all of the shares in the consolidated banks and the stockholders of the original Whitney-New Orleans received the remainder of the stock in Whitney Holding.

"*Fourth:* Whitney-New Orleans then provided $650,000. to Whitney Holding with which to purchase all of the stock in Whitney-Jefferson.

"9. On October 3, 1961, defendant Comptroller gave preliminary approval to the formation of the Crescent City National Bank and the Whitney National Bank in Jefferson Parish, Louisiana, subject to approval by the Federal Reserve Board of the application of Whitney Holding to become a bank holding company under the Bank Holding Company Act of 1956.

"10. On May 3, 1962, the Federal Reserve Board approved the application of Whitney Holding.

"11. Subsequently, defendant Comptroller then
464 approved the consolidation of the existing Whitney-New Orleans into the Crescent City National Bank under the original name of Whitney-New Orleans, and this was accomplished.

"12. Whitney Holding thereupon purchased all of the stock of Whitney-Jefferson for $650,000. by which time the Articles of Association and the Certificate of Organization of Whitney-Jefferson had been executed and filed with defendant Comptroller.

"13. On June 9, 1962, before defendant Comptroller could issue a Certificate of Authority authorizing Whitney-Jefferson to commence the business of banking in Jefferson Parish, Louisiana, this suit was instituted.

"14. Defendant Comptroller voluntarily withheld issuance of a Certificate of Authority until June 27, 1962, when a temporary restraining order was issued by this Court. After hearing, a preliminary injunction was ordered granted on July 6, 1962, and was signed and filed on July 10, 1962.

"15. On the same date, July 10, 1962, Louisiana Act 275 of 1962 became effective as the law of Louisiana. Section 3(5) of said Act provides:

"'It shall be unlawful . . . (5) for any bank holding company or subsidiary thereof to open for business any bank not now opened for business, whether or not a charter, permit, license or certificate to open for business has already been issued.

* * * * *

"18. Plaintiffs and intervening plaintiffs have presented sworn, uncontroverted facts to show that, if defendant Comptroller is not prohibited from issuing his Certificate of Authority to Whitney-Jefferson, each plaintiff bank will sustain irreparable injury and damage in excess of $10,000, exclusive of interest and costs."

Among the court's conclusions of law are the following:

"2. Defendant Comptroller of the Currency has no discretion to issue a Certificate of Authority to a national banking association to commence a banking business in a manner prohibited by law (*commercial State Bank* v. *Gidney*, 174 F. Supp. 770, 778, affd. 278 F. 2d 871 (D.C. App. 1960); *Camden Trust Co.* v. *Gidney*, 301 F. 2d 521 (D.C. App.), cert. denied, 369 U.S. 886 (1962); *Wayne Oakland Bank* v. *Gidney*, 252 F. 2d 537 (C.C.A. 6), cert. denied 358 U.S. 830 (1958)).

"3. The Federal Bank Holding Company Act, at 12 U.S.C. § 1846, reserved to the States such powers and

465

jurisdiction as they had or might exercise in the future with respect to banks, bank holding companies and subsidiaries of bank holding companies, and Section 3(5) of Louisiana Act 275 of 1962 was enacted pursuant to and within the scope of the said powers and jurisdiction so reserved to the States by Congress, and said statute is constitutional (*Braeburn Securities Corp.* v. *Smith*, 153 N.E. 2d 806, appeal dismissed for want of a substantial Federal question, 359 U.S. 311 (1959); *Opinion of the Justices*, 151 A. 2d 236 (N.H., 1959); also 12 U.S.C. § 1842(d), *Federal Bank Holding Company Act*).

"4. Act 275 of 1962 is directly applicable to intervening defendant, Whitney National Bank in Jefferson Parish, a wholly owned subsidiary of a Louisiana-incorporated bank holding company, and said statute makes it unlawful for said intervening defendant to commence the business of banking in Louisiana. Accordingly, defendant Comptroller of the Currency should be permanently enjoined and restrained from issuing a Certificate of Authority licensing Whitney-Jefferson to commence such unlawful operations (*Commercial State Bank* v. *Gidney, supra*; *Wayne Oakland Bank* v. *Gidney, supra*).

"5. Plaintiff and intervening plaintiff banks, faced with proposed invasion of property rights and injury from the proposed unlawful issuance by defendant Comptroller of a Certificate of Authority to intervening defendant Whitney-Jefferson, have standing to bring this suit, and they have no other adequate remedy at law (*Wisconsin Bankers Association* v. *Robertson*, 190 F. Supp. 90, 94, affd. 294 F. 2d 714 (App. D.C.), cert. 466 denied 368 U.S. 938, rehearing denied 368 U.S. 979 (1961); *Commercial State Bank* v. *Gidney, supra*; *Wayne Oakland Bank* v. *Gidney, supra*.)

* * * * *

"7. The cross motions for summary judgment of plaintiffs and intervening plaintiff should be and are granted; and the motions for summary judgment of the defendant and intervening defendant and the cross motion to

dismiss by defendant Comptroller should be, and are, denied."

Judgment was entered in accordance with the conclusions. Whitney-Jefferson filed notice of appeal therefrom on January 31, 1963, and the Comptroller's notice of appeal was filed February 1, 1963. That explains why there are two separately styled and numbered proceedings in this court in what is in reality a single appeal.

In the brief for the Comptroller it is argued vigorously and at some length that the appellees have no standing to challenge his administrative determination to issue a Certificate of Authority to Whitney-Jefferson.[8] The only purpose of the state banks in filing this suit, says his brief, is to avoid the lessening of business and profits which might result from the presence of a new competing institution in the area; but, he continues, possible economic disadvantage from competition is not enough, absent a special Congressional grant of standing, to permit the disadvantaged party to invoke the jurisdiction of the courts.

We were told by his counsel on oral argument, however, that the Comptroller had instructed him not to press the lack of standing argument, as he desired a ruling on the merits. If we could accept the Comptroller's offer to waive the point
467 concerning standing, this opinion would be substantially shortened, as the discussion of the merits, when reached, will not detain us long. The point cannot be thus waived by the Comptroller because it is jurisdictional: if the appellees lack standing to sue, their complaint should have been dismissed on that ground. Jurisdiction cannot be conferred by waiver; it is a threshold question which must be examined.

The Comptroller's brief contends that "appellees can point to no legal or actionable wrong to them arising from the opening of a new national bank." It is, of course, true, as held in *Alabama Power Co.* v. *Ickes*, 302 U.S. 464 (1938), that one who has no contractual or statutory right to be free of competition, and no property right which would be infringed thereby, has no standing to challenge federal administrative action which

[8] It is interesting to observe that the other appellant, Whitney-Jefferson, does not argue or even suggest that the state banks lack standing to sue.

simply increases the amount or effectiveness of competition. And we held in *Union Nat. Bank of Clarksburg* v. *Home Loan Bank Bd.*, 98 U.S. App. D.C. 204, 233 F. (2d) 695 (1956), that, in the circumstances of that case, existing banks had no standing to challenge the Home Loan Bank Board's issuance of a charter to a proposed savings and loan association. In that case, the complaining banks were relying on a provision of the Home Owners Loan Act that

> "No charter shall be granted . . . unless in the judgment of the Board a necessity exists for such an institution in the community to be served . . . nor unless the same can be established without undue injury to properly conducted existing local thrift and home-financing institutions."

We held that the complaining banks were not "local thrift and home-financing institutions" and so were not protected by the statute from the competition of a lawfully-established federal savings and loan association.

These and similar cases do not apply here because the applicable statutes and the facts of this case are different.[9]
468 For instance, the appellees, Bank of New Orleans and Trust Company and Bank of Louisiana in New Orleans, are state banks having their principal and branch offices in Orleans Parish. They derive substantial volumes of business from the contiguous "east bank" portion of Jefferson Parish but are prohibited by Louisiana law from establishing branches there or in any parish other than Orleans.

They allege that Whitney, with its main office in Orleans Parish but also with substantial business from east Jefferson Parish, is subject to the same restriction as to the establishment of outside branches because 12 U.S.C. § 36(c) makes the Louisiana statute applicable to national banks. The state banks say that thus they have a right, under the combination of federal and state statutes, to be free of the competition in east Jefferson Parish which would result if Whitney of Orleans Parish

[9] Our decision in *Kansas City Power & Light Co.* v. *McKay*, 96 U.S. App. D.C. 273, 225 F. (2d) 924, *cert. denied* 350 U.S. 884 (1955), for example, involved federal competition sanctioned by Congress, while the competition here is private, and not so sanctioned.

is allowed to establish branches in east Jefferson where the state law forbids them to go. The state banks allege further that the Comptroller is not authorized to permit, but rather is prohibited by law from permitting, Whitney of New Orleans to establish branches in east Jefferson, and that his unlawful act in doing so would result in illegal competition and a consequent violation of their right, guaranteed by state and federal statutes, to be free of such competition.

The other appellee state bank is in nearby Lafayette Parish and has substantial business from east Jefferson which would be diminished by the unlawful competition of Whitney National's branches.

Clearly, then, under the allegations of their complaint,
469 the three state banks have standing. It is not enough to say *contra* that the Whitney-Jefferson bank will not be a branch of Whitney-New Orleans and that, therefore, the state banks have no legal right to protection against its establishment and consequently no standing to sue. For, whether or not Whitney-Jefferson will in legal effect be a branch of Whitney-New Orleans is the question tendered for adjudication, upon which under the circumstances the question of standing in part depends. If it is determined that Whitney-Jefferson is not a branch, it might or might not follow that the state banks had no standing—a matter on which we need not pass; but if it is held to be tantamount to a branch purporting to have been federally authorized, their standing would be indubitable.

Nor is it an answer to say that the state banks may utilize the holding company device to enter east Jefferson Parish, just as Whitney-New Orleans is attempting to do. Regardless of whether Act 275 of the 1962 Louisiana legislature is a direct prohibition against the opening of the new Whitney-Jefferson, unquestionably it effectively prevents the appellee state banks from opening new banks in Jefferson Parish through the medium of holding companies or otherwise. So, the complaint is that the Comptroller has permitted Whitney-New Orleans to organize a new branch in east Jefferson through the use of a holding company device which Louisiana law forbids a state bank to employ, and is about to authorize its opening.

The distinction between this case and those cited by the Comptroller as to standing to sue was carefully drawn by the Supreme Court in *Alabama Power Co.* v. *Ickes, supra* at page 484 (one of his citations), when it said:

> "*Frost* v. *Corporation Commission*, 278 U.S. 515, relied upon by petitioner, presents an altogether different situation. Appellent there owned a cotton-gin-
> 470 ning business in the city of Durant, Oklahoma, for the operation of which he had a license from the corporation commission. The law of Oklahoma provided that no gin should be operated without a license from the commission, which could be obtained only upon specified conditions. We held that such a license was a franchise constituting a property right within the protection of the Fourteenth Amendment; and that while the acquisition of the franchise did not preclude the state from making similar grants to others, *it was exclusive against an attempt to operate a competing gin without a permit or under a void permit.* The Durant Co-operative Gin Company sought to obtain a permit from the commission which, for reasons stated in our opinion, we held would be void and a clear invasion of Frost's property rights. *We concluded that a legal right of Frost to be free from such competition would be invaded by one not having a valid franchise to compete*, and sustained Frost's right to an injunction against the commission and the Durant company. See *Corporation Commission* v. *Lowe*, 281 U.S. 431, 435. *The difference between the Frost case and this is fundamental; for the competition contemplated there was unlawful while that of the municipalities here is entirely lawful.*" [Emphasis supplied.]

Although the *Frost* case is not factually identical with this one, it is sufficiently similar to be dispositive of the question of standing. The charters of the appellee banks, granted by the State of Louisiana, are guarded by a combination of specifically applicable federal and state statutes. The appellee banks cannot complain of lawful competition from other lawfully chartered state or national banks because their own char-

ters are not exclusive licenses. But where, as here, the threatened competition arises from an allegedly illegal facility, the appellee state banks have standing to invoke the jurisdiction of a federal court to challenge the alleged unlawful federal administrative action which admittedly would result in irreparable injury to their property rights in their charters.

The Comptroller asserts he has discretion as to
471 whether to issue a Certificate of Authority to a new national bank which cannot be judicially controlled. The same contention was made in *Commercial State Bank of Roseville* v. *Gidney*, 174 F. Supp. 770 (D.C.D.C. 1959), where two state banks within two and one-half miles of a proposed national bank branch sought to enjoin the then Comptroller from authorizing the unlawful competition which threatened them with immediate and irreparable injury. Uncontroverted affidavits showed that the town of Clinton, site of the proposed branch, could not itself support the new facility, which would therefore necessarily draw its business from the surrounding communities already served by the complaining state banks. District Judge Youngdahl brushed aside the Comptroller's discretion argument by saying, at page 778:

> "Defendant argues that the approval or disapproval of branches of national banks is a matter clearly committed to the *discretion* of the Comptroller. But there is *no discretion* in the Comptroller to approve the establishment of a branch office at a location prohibited by law. . . . In the instant case, there is no desire to control the defendant's discretion. . . . But, as mentioned above, there is *no discretion* to unlawfully issue a certificate. . . ." [Emphasis added.]

We affirmed Judge Youngdahl's decision. 108 U.S. App. D.C. 37, 278 F. (2d) 871 (1960).

In the case of *National Bank of Detroit* v. *Wayne Oakland Bank*, 252 F. (2d) 537, *cert. denied* 358 U.S. 830 (1958), the Sixth Circuit said, at page 544:

> ". . . The district court found, as a fact, that the competition resulting from the opening and operation of a branch by the National Bank of Detroit would

certainly cause inestimable damage to The Wayne Oakland Bank. Whether the rights of a party are infringed by unlawful action of an individual or by exertion of unauthorized federal administrative power, it is entitled to have such controversy adjudicated."

472 Judge Tamm of our District Court held in *Wisconsin Bankers Association* v. *Robertson*, 190 F. Supp. 90 (1960), that national and state banks of Wisconsin collectively have the exclusive right to conduct the business of banking in that state, which gave them standing to challenge alleged competition in that business by federal savings and loan associations.[10]

In sum, we have no doubt that the three state banks [11] had standing to sue the Comptroller in this action in order to test the legality of his proposed action. This conclusion makes it unnecessary to decide whether the Louisiana State Bank Commissioner had standing to sue.

We turn to the question on the merits: whether the District Court was correct in permanently restraining and enjoining the Comptroller from issuing a Certificate of Authority to Whitney-Jefferson. If Whitney-Jefferson, in its organization, management and operation, would be to all intents and purposes a branch of Whitney-New Orleans forbidden by 12 U.S.C. § 36(c), the authority of the District Court to enjoin him from issuing a Certificate of Authority is quite clear.

Since Whitney-Jefferson clearly is not an affiliate, the question is whether the elaborate and ingenious scheme of reorganization devised by Whitney-New Orleans results in what is in reality the establishment of a branch of Whitney-New Orleans in east Jefferson Parish, in violation of federal law.

There was actually no pretense about the matter: Whitney of New Orleans frankly proposed to evade the statutes by establishing through the holding company arrangement

473 an office in east Jefferson Parish which it would manage and control. Its president said on October 27, 1961, in

[10] We affirmed; no cross appeal was filed. 111 U.S. App. D.C. 85, 294 F. (2d) 714, *cert. denied* 368 U.S. 938 (1961), *rehearing denied* 368 U.S. 979 (1962).

[11] The District Court's finding of fact No. 18 showed their irreparable injury.

his communication to Whitney-New Orleans stockholders which explained in detail the plan of reorganization:

> "The basic purpose of the program is to allow the Whitney organization in New Orleans to commence a Holding Company operation controlling a bank in East Jefferson Parish to protect Whitney's competitive position in that area into which many of Whitney's present customers have moved."

On October 28, 1961, he wrote to his stockholders:

> "'. . . From the depositors [*sic*] point of view, those in the smaller bank will be assured of the *same management* which directs the larger one without possibility of interruption. They will be assured of access to the large loan limits of *the combined banks.* They will have the security which arises out of the fact that *the large and the small bank have identical ownership as well as management.*
>
> . . . . . .
>
> "From the customer point of view there will be no conflict of interest arising out of the manner in which the customer sees fit to divide his business between the commonly owned banks in the two parishes. *He will have the full benefits of a relationship with the large bank* and its officers.
>
> "Because of *the permanent relationship* between the large and the smaller bank, the smaller one can operate safely with a smaller capitalization." [Emphasis supplied.]

This is a very good description of a branch banking operation, regardless of the fact that Whitney's president did not denominate it as such. The nature of the arrangement, and not the label applied to it, determines the character of the relationship between two banking institutions. In 12 U.S.C. § 36 Congress gave a broad meaning to the word "branch":

474 "(f) The term 'branch' as used in this section shall be held to include *any branch bank, branch office, branch agency, additional office, or any branch place of business* located in any state . . . at which de-

posits are received, or checks paid, or money lent." [Emphasis supplied.]

The Board of Governors of the Federal Reserve System, although it approved the application of Whitney Holding Corporation to acquire the capital stock of Whitney-New Orleans and Whitney-Jefferson, was under no illusion as to the true nature of the transaction. It said:

> "Under the law of Louisiana, a bank may not establish branches outside of the parish in which its head office is situated. . . .
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> • • • • • •
>
> ". . . *The stated purpose of the proposed holding company system is to enable an organization centered about Whitney New Orleans to provide banking services not only through its existing 12 offices within the City of New Orleans but also through offices in the East Bank of Jefferson Parish.* The holding company system will be under the direction of the present executive management of Whitney New Orleans; *in fact, for present purposes the holding company itself is simply the means by which Whitney banking offices may be established and operated in East Bank.* Consequently, the character of the management and the prospects of the Applicant and its two proposed subsidiary banks may be evaluated largely on the basis of the financial history and condition, character of the management, and prospects of Whitney New Orleans.
>
> "The financial history of Whitney New Orleans has been satisfactory. The condition of that bank is sound and its management is regarded as satisfactory. Accordingly, it is believed that the management of Applicant and Whitney Jefferson will be satisfactory and the prospects of the holding company, *which depend principally upon the prospects of Whitney New Orleans*, are favorable.
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> • • • • •
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> 475 ". . . *The management and policies of the holding company system, it appears, would be*

equivalent to those of Whitney New Orleans. . . ." [Emphasis supplied.]

The Board of Governors said, however, in denying the protestants' petition for reconsideration of its approval of Whitney Holding's application:

> ". . . [T]hey [the arguments for reconsideration] relate largely to an alleged violation of provisions of the National Bank Act, which is administered by the Comptroller of the Currency . . . ." [12]

Whitney-New Orleans's purpose of evading federal and state statutes forbidding branch banking in Louisiana beyond parish lines was known to the Comptroller when he approved the arrangement. His affidavit, which is in the record, states:

> ". . . [T]he Whitney National wished to explore with the Comptroller whatever legal means were available for a like expansion into this growing area, which needs additional banking facilities. The formation of an affiliate bank was discussed and the formation of a holding company was also discussed. The bank
> 476 management felt that a holding company which would own 100% of the stock of both the old bank and the new bank would be preferable to the formation of an affiliate of which the controlling stock would be held by the same persons who control Whitney New Orleans, but which, in view of the wide stock distribution of Whitney New Orleans, would invariably have a minority of stockholders who did not own stock in both banks. The existence of the minority stock interest in each bank, which did not hold corresponding shares in

[12] This paragraph containing the excerpt last quoted above is as follows:

"The Board has considered the reasons advanced in the Petition for Reconsideration. To a considerable extent, these are based upon allegations that the Whitney Reorganization Program was not in conformity with applicable provisions of Federal statutes. It is also alleged that the Board's action 'will unnecessarily place into the hands of federally chartered banks a powerful and unfair competitive advantage over State banks . . . .' In the judgment of the Board, those arguments are without substantial merit. In addition, they relate largely to an alleged violation of provisions of the National Bank Act, which is administered by the Comptroller of the Currency, an official of the United States Treasury Department."

the other, was considered by the Whitney management to be an undesirable situation because it could conceivably hamper the most efficient and effective day-to-day operation of the two banks. Since the same group would be managing both banks, it was thought that situations could arise in which it would be impossible for the interests of two different groups of minority stockholders to be fully protected. For this reason, the Whitney management, as was their right and prerogative elected to use a holding company for the purpose of establishing a new bank in Jefferson Parish.

"At all times the applicable Louisiana statutes forbidding the establishment of branch offices across parish lines were fully considered and there was no suggestion that the formation of a holding company would be in any way clandestine or evasive. . . ."

The Comptroller states in his brief:

". . . [T]he Ninth Circuit has, in a case substantially on all fours with one at bar, recently rejected an attempt to hold the branch banking prohibitions of 12 U.S.C. 36 applicable to an affiliate of a bank holding company. *First Nat. Bank of Billings* v. *First Bank Stock Corp.*, 306 F. 2d 937 (C.A. 9 [1962]). . . ."

The *Billings* case is far from being factually "on all fours" with the present case. There the bank holding company was organized in 1929, and had been operating in that capacity for 30 years. It possessed stock in 87 banks with 94 offices.
477 Thus, it was not created or organized by a bank, as Whitney Holding was, solely for the purpose of opening a branch office of that bank. It was the traditionally recognized bank holding company which, with its own capital, invests in or buys the stock of banks. It was not the type of holding company here involved, whose only capital was the money siphoned through it by Whitney-New Orleans to open Whitney-Jefferson in a prohibited location.

And the *Billings* opinion says, at page 942:

". . . What must appellants show, to establish that Valley is such a branch? They must show, that, in sub-

> stance, Midland is doing business through the instrumentality of Valley, or vice versa, in the same way as if the institutions were one. (Cf. Camden Trust Co. v. Gidney, D.C. Cir., 1962, 301 F. 2d 521) We do not agree with appellees that the fact that the two banks are separate corporate organizations demonstrates conclusively that one is not a branch of the other. In the banking field, as elsewhere, courts have power to 'pierce the corporate veil' when the realities require it."

We agree with the Ninth Circuit that the corporate veil should be pierced whenever one bank is "doing business through the instrumentality of" the other or "in the same way as if the institutions were one." "The unitary type of operation," said in the *Billings* opinion to be "characteristic of branch banking," is present here. In such circumstances, the relation of parent and branch exists, even though the banks are separate corporate organizations.

The facts already recited sufficiently show, we think, that Whitney-New Orleans intends to do business through Whitney-Jefferson in the same way as if the institutions were one. The president of Whitney-New Orleans frankly made this quite clear. We recite some of his statements: On June 28, 1961, in submitting to the Comptroller applications to organize Crescent City and Whitney-Jefferson and to consolidate Crescent City with the original Whitney-New Orleans, Whitney's president said:

478

> "These applications form part of an overall plan for the operation in the Parish of Orleans and in the Parish of Jefferson of the Whitney organization in holding company form."

On October 27, 1961, he advised his shareholders that—

> "The basic purpose of the program is to allow the Whitney organization in New Orleans to commence a Holding Company operation controlling a bank in East Jefferson Parish to protect Whitney's competitive position in that area into which many of Whitney's present customers have moved."

Addressing them on October 28, 1962, he spoke of Whitney-New Orleans and Whitney-Jefferson as "the combined banks," said the large and small banks will "have identical ownership as well as management," and referred to the organization plan as a "method of pooling all of the deposits of our customers and of our capital funds . . . ." And, as we have pointed out, the Board of Governors of the Federal Reserve System said "the holding company itself is simply the means by which Whitney banking offices may be established and operated in East Bank [east Jefferson Parish]."

Consequently, we pierce the corporate veil which shrouds this intricate transaction, and see Whitney-New Orleans attempting to establish a branch in Jefferson Parish in violation of 12 U.S.C. § 36(c). It is a bootstrap operation by which Whitney-New Orleans, using its own funds in corporate maneuvering, seeks to establish a branch in prohibited territory. Like Jacob of old, Whitney-New Orleans covered its hands with the Esau-like plan of reorganization and, despite the telltale sound of its own voice, obtained the blessing of the Comptroller of the Currency. Unlike Isaac, however, the Comptroller was not gulled by the ruse; acting *ultra vires* in the circumstances shown, he knowingly permitted it because he considered the end desirable, and because he thought the corporate maneu-
479 vering impervious to attack. But when the corporate veil is pierced, it becomes apparent that both voice and hands were those of Whitney-New Orleans.

The Comptroller contends that the reasoning and holding of our *Camden Trust* opinion [3] are controlling here. We do not agree. Whitney of New Orleans considered the "affiliate" arrangement we approved in the *Camden* case, and decided not to use it because it does not permit the identity of ownership provided by the holding company device, and because it does not sure that even the permitted affiliation will remain constant.

Quite unlike the sum total of the several factors which led us to approve the "affiliate" status in the *Camden Trust* situa-

[3] *Supra*, note 3.

tion, we need observe only that here, *inter alia*, the holding company is not providing Whitney-Jefferson with new and fresh capital, but with capital supplied by Whitney-New Orleans; the new bank will be managed and controlled by the executives of Whitney-New Orleans; and the name, Whitney National Bank in Jefferson Parish (the last three words in small letters on its checks and other forms), is easily susceptible of confusion with the parent organizer.[14] The Whitney National Bank of New Orleans.

We are unwilling to extend the holding of the *Camden*
480 *Trust* case to cover a situation such as that presented here. We think it clear that the opening of Whitney-Jefferson is prohibited by 12 U.S.C. § 36 and that, consequently, the Comptroller was properly enjoined from issuing a Certificate of Authority for it to begin business. It is therefore unnecessary for us to decide whether the opening is also prohibited by Act 275 of the Louisiana legislature.[15]

Affirmed.

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[14] On June 28, 1961, the Whitney-New Orleans mailed to the then Comptroller of the Currency the following:

1. An application to organize the Crescent City National Bank.
2. An application to organize Whitney National Bank in Jefferson Parish.
3. An application for approval to consolidate the Crescent City National Bank with the present Whitney National Bank of New Orleans.

At that time, Whitney Holding Corporation had not been incorporated, so it was not the organizer of Whitney-Jefferson.

[15] If so, the actual opening of Whitney-Jefferson would violate the state statute even if the Comptroller had already issued his Certificate of Authority, for Act 275 forbids the opening "whether or not, a charter, permit, license or certificate to open for business has already been issued."

481 In United States Court of Appeals for the District of Columbia Circuit

No. 17672, September Term, 1962

[File endorsement omitted]

Civil 1857–62

WHITNEY NATIONAL BANK IN JEFFERSON PARISH, APPELLANT

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL., APPELLEES

Appeal from the United States District Court for the District of Columbia.

Before WILBUR K. MILLER, WASHINGTON and DANAHER, *Circuit Judges.*

Judgment

August 14, 1963

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed, and it is

Further ordered by this Court that appellees recover from appellant their taxable costs on appeal, and have execution therefor.

Per Circuit Judge WILBUR K. MILLER.

482 In United States Court of Appeals for the District of Columbia Circuit

[File endorsement omitted]

No. 17672, September Term, 1963

WHITNEY NATIONAL BANK IN JEFFERSON PARISH, APPELLANT

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL., APPELLEES

No. 17681

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY, APPELLANT

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL., APPELLEES

Before BAZELON, *Chief Judge*, WILBUR K. MILLER, FAHY, WASHINGTON, DANAHER, BASTIAN, BURGER, WRIGHT, and MCGOWAN, *Circuit Judges*, in chambers.

Order denying the petitions for rehearing en banc

October 17, 1963

On consideration of the petition of appellant in case No. 17672 for rehearing *en banc*, of the petition of appellant in case No. 17681 for rehearing *en banc*, and of the answer thereto filed by appellee Banks, and on consideration of the motion of appellant in case No. 17681 for leave to file a supplemental memorandum in support of the petition for rehearing *en banc*, and of the objection thereto filed by appellee Banks, and on consideration of the motion of appellee Banks for leave to file a supplemental appendix to their reply to appellant's petition for rehearing in case No. 17681, it is

Ordered by the court that: (1) appellant's motion for leave to file a supplemental memorandum in support of the petition for rehearing *en banc* in case No. 17681 is hereby denied; (2) the motion of appellee Banks for leave to file supplemental appendix to their reply to appellant's petition for rehearing *en banc* in case No. 17681 is hereby granted; and (3) appel-

lants' aforesaid petitions for rehearing *en banc* are hereby denied.

Per Curiam

Circuit Judges WRIGHT and MCGOWAN did not participate in the foregoing order.

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485 * * * * *

[Clerk's Certificate to foregoing transcript omitted in printing]

486 Supreme Court of the United States

No. ——, October Term, 1963

JAMES J. SAXON, PETITIONER

vs.

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL.

Order extending time to file petition for writ of certiorari

January 9, 1964

Upon consideration of the application of counsel for petitioner,

It is ordered, That the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 30, 1964.

EARL WARREN,

Chief Justice of the United States.

Dated this 9th day of January, 1964.

487 Supreme Court of the United States

No. 763, October Term, 1964

WHITNEY NATIONAL BANK IN JEFFERSON PARISH, PETITIONER

vs.

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL.

Order allowing certiorari

March 23, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is consolidated with No. 798 and a total of two hours is allotted for oral argument.

And it is further ordered, That the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

488 Supreme Court of the United States

No. 798, October Term, 1963

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY, PETITIONER

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL.

Order allowing certiorari

March 23, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is consolidated with No. 763 and a total of two hours is allotted for oral argument.

And it is further ordered, That the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT, U.S.

No. 763

Supreme Court of the United States

OCTOBER TERM, 1963

WHITNEY NATIONAL BANK IN JEFFERSON PARISH,
Petitioner,

v.

BANK OF NEW ORLEANS AND TRUST COMPANY; ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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Of Counsel.

January, 1964.

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	4
Reasons for Granting the Writ	9
A. The Decision Below Presents Issues of General Importance in the Construction and Administration of the Federal Banking Laws	11
B. The Court of Appeals Seriously Departed from Proper Procedural Standards in Determining a Disputed Issue of Fact on Motions for Summary Judgment	21
C. Respondents' Sole Remedy is a Review Proceeding in a Court of Appeals as Provided in the Bank Holding Company Act	26
Conclusion	27
Appendix	28
Statutes Involved	28
Opinion of the Court of Appeals	37
Judgment of the Court of Appeals	62
Order of the Court of Appeals Denying Rehearing	63

CITATIONS

Cases:

Camden Trust Co. v. *Gidney*, 112 U.S. App. D.C. 197, 301 F.2d 521, *cert. denied*, 369 U.S. 886 (1962)	14, 20
Eccles v. *Peoples Bank of Lakewood Village*, 333 U.S. 426	22
First Colorado Bankshares, Inc., F.R.B., Nov. 14, 1963	13
First Nat'l Bank in Billings v. *First Bank Stock Corp.*, 306 F.2d 937 (9th Cir. 1962)	11, 19, 20, 21, 25
Fountain v. *Filson*, 336 U.S. 681	22
Kennedy v. *Silas Mason Co.*, 334 U.S. 249	22
Poller v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464	22, 23
Sartor v. *Arkansas Natural Gas Corp.*, 321 U.S. 620	22

Statutes:

	Page
Bank Holding Company Act, 12 U.S.C. §§ 1841-48,	3, 6, 13, 15, 17, 18, 26
Fed. R. Civ. P. 56(e)	3-4
Judicial Code § 1254(1), 28 U.S.C. § 1254(1)	2
Judicial Code § 1331, 28 U.S.C. § 1331	7
La. Act 275 of 1962	7
La. Rev. Stat. 6: §§ 54, 328	4
McFadden Act, 44 Stat. 1224 (1927)	15
National Bank Act, 12 U.S.C. §§ 21-27	3, 6, 7, 12
12 U.S.C. § 36(c)	2, 3, 4, 9, 15, 16, 17
12 U.S.C. § 61	15, 19
12 U.S.C. § 82	18
12 U.S.C. § 84	18
12 U.S.C. § 91	18
12 U.S.C. § 93	18
12 U.S.C. § 161	15
12 U.S.C. §§ 191-200	18
12 U.S.C. § 215	6
12 U.S.C. § 221a	15
12 U.S.C. § 334	15
12 U.S.C. § 481	15

Miscellaneous:

Board of Governors of the Federal Reserve System, "Branch, Chain, and Group Banking," in *Banking Studies* (1941)	14
Chain Banking: Stockholder and Loan Links of 200 Largest Member Banks, Report by Wright Patman, Chairman, to the Select Comm. on Small Business, 87th Cong. (1963)	14
Comptroller of the Currency, *Annual Report, 1929*	21
Fischer, *Bank Holding Companies* (1961)	14
H.R. 6227, 84th Cong.	15-16
H.R. Rep. No. 609, 84th Cong., 1st Sess. (1955)	14
Hearings Before the House Comm. on Banking and Currency Under H. Res. 141 (Group, Chain and Branch Banking), 71st Cong., 2d Sess. (1930)	14, 15

Miscellaneous—Continued

Hearings Before a Subcomm. of the Senate Comm. on Banking and Currency (Control of Bank Holding Companies), 84th Cong., 1st Sess. (1955) .....
Rand McNally, *Bankers' Directory* (final 1963 ed.) .....
S. 880, 84th Cong. .....
S. 2577, 84th Cong. .....
S. Rep. No. 1095, 84th Cong., 2d Sess. (1956) .....

Supreme Court of the United States

OCTOBER TERM, 1963

No.

WHITNEY NATIONAL BANK IN JEFFERSON PARISH,
Petitioner,

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Petitioner, Whitney National Bank in Jefferson Parish (hereafter "Whitney-Jefferson"), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on August 14, 1963, in the above-entitled case and in the companion case of *James J. Saxon, Comptroller of the Currency* v. *Bank of New Orleans and Trust Company.* That judgment affirmed, on other grounds, a judgment of the United States District Court for the District of Columbia granting a declaratory judgment and a permanent injunction against petitioner and the defendant Comptroller which forbids the opening for business of a national bank

(Whitney-Jefferson). Petitioner is advised that the Comptroller of the Currency (hereinafter "the Comptroller") will file a petition for certiorari in the companion case.

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (McLaughlin, J.) (R. 435) is reported at 211 F. Supp. 576 (*sub nom. Bank of New Orleans and Trust Company* v. *Saxon*). The opinion of the Court of Appeals (Miller, J.) is reported at 323 F.2d 290, and appears in the Appendix at page 37. The judgment of the Court of Appeals appears in the Appendix at page 62, and the order of the Court of Appeals denying petitioner's petition for rehearing appears in the Appendix at page 63.

JURISDICTION

The opinion and judgment of the Court of Appeals for the District of Columbia Circuit were filed on August 14, 1963. Petitioner's timely petition for rehearing en banc was denied by that Court on October 17, 1963. The Jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Can a bank holding company subsidiary, organized in accordance with the provisions of the Federal Bank Holding Company Act of 1956 and complying with all other federal statutes and regulations, be a "branch" within the meaning of 12 U.S.C. § 36(*c*)?
2. When a Court of Appeals concludes that the crucial issue in a case decided below on summary judgment is an issue of fact not decided

by the District Court, may the Court scrutinize the papers and decide the case on the basis of a view of the facts never alleged by any party and controverted by sworn material in the record, or should it remand the case to the District Court for a trial?

3. When Congress has determined that review of federal administrative action approving a bank-holding-company application should be by petition in a Court of Appeals, may such review be had by equitable and declaratory proceedings in a District Court?

STATUTES INVOLVED

The statutes primarily involved are the provisions of the National Bank Act authorizing the Comptroller of the Currency to issue certificates permitting the opening for business of national banks (12 U.S.C. §§ 26 and 27); the provision of the National Bank Act regulating the establishment of branches by national banks (12 U.S.C. § 36(c)); and certain sections of the Federal Bank Holding Company Act of 1956, *e.g.*, 12 U.S.C. §§ 1841, 1842, 1845, 1846, 1847, and 1848. These statutes appear in the Appendix hereto at pages 28-36.

Also involved is Rule 56(c) of the Federal Rules of Civil Procedure, which reads as follows:

> "(c) Motion [for summary judgment] and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

STATEMENT

Whitney National Bank of New Orleans (hereafter "Whitney-New Orleans") is a national bank located in the city of New Orleans, which is co-extensive with the Parish of Orleans. That parish includes only the central part of the greater New Orleans metropolitan area. Both Whitney-New Orleans and all other New Orleans national banks are prevented by 12 U.S.C. § 36(c) from establishing branches outside Orleans Parish. That section provides that national banks may establish branches only within the geographical limits imposed by state law on state banks. Louisiana state banks in New Orleans with assets of $100,000. or more are prohibited from establishing branches outside Orleans Parish by Louisiana Revised Statues 6: §§ 54 and 328.

Jefferson Parish, adjacent to Orleans Parish, is a rapidly developing part of the New Orleans metropolitan area (R. 100-101). Many of the residents of Jefferson Parish have been customers of Whitney-New Orleans and other New Orleans banks, but find it inconvenient to maintain their relations with downtown banks which are precluded from establishing branches in their neighborhoods. Two of Whitney-New Orleans' three principal competitors have met this problem by establishing "affiliate" or "satellite" banks in Jefferson Parish. For example, Whitney-New Orleans'

largest competitor, the National Bank of Commerce of New Orleans, accomplished this result by arranging for a majority of its stockholders to organize, as majority owners, a new bank in Jefferson Parish, named the National Bank of Commerce in Jefferson Parish (R. 42, 49-56, 116-117).

The close connections established by these competitors with banks in Jefferson Parish gave them a substantial competitive advantage. In these circumstances Whitney-New Orleans determined that it, too, must establish relations with a bank in Jefferson Parish. Whitney-New Orleans therefore prepared a program by which a new national bank would be established in Jefferson Parish, a separate corporate entity, but connected with Whitney-New Orleans in that the stock of both banks would be owned by the same bank holding company. The purpose of this program was to obtain for Whitney-New Orleans as many of the advantages of having a branch in Jefferson Parish as could legally be had through a holding-company system.

The stockholders of Whitney-New Orleans adopted a plan of reorganization which would result in the ownership of the stock of Whitney-New Orleans by Whitney Holding Corporation and the ownership of the stock of Whitney Holding *pro rata* by the former stockholders of Whitney-New Orleans. Whitney-New Orleans would then pay to Whitney Holding, out of its undivided profits available for dividends, a dividend of $650,000. Whitney Holding would use these funds to establish, as a new subsidiary, Whitney National Bank in Jefferson Parish (R. 46). Full disclosure was made by Whitney-New Orleans of the

nature and purposes of this program (R. 41-48, 324-328).

The Comptroller of the Currency was authorized by law to pass on the reorganization of Whitney-New Orleans and the formation of a new national bank in Jefferson Parish. 12 U.S.C. § 26, as amended, 12 U.S.C. § 26 (Supp. IV, 1959-1962); 12 U.S.C. § 215, as amended, 12 U.S.C. § 215 (Supp. IV, 1959-1962). The Federal Reserve Board had jurisdiction to pass on the use of funds of Whitney Holding to create Whitney-Jefferson and on the acquisition of the stock of that bank by Whitney Holding. Act of May 9, 1956, c. 240, §§ 2-9, 70 Stat. 133, as amended, 12 U.S.C. §§ 1841-1848. Whitney-New Orleans accordingly submitted its program to the Comptroller of the Currency and the Federal Reserve Board, both of which after detailed investigation approved the program. The Federal Reserve Board's action was taken after a public hearing, held on January 17, 1962, of which notice had been previously given in the Federal Register (R. 58) inviting all interested parties to appear and register their views. None of the respondents appeared or registered any objection to the Whitney program or any part thereof (R. 61). The Federal Reserve Board's order of May 3, 1962, approved the formation of Whitney Holding Corporation and its acquisition of the stock of its two proposed banking subsidiaries (R. 96).

In the same month Whitney-Jefferson was organized and recognized by the Comptroller, who approved the final steps necessary to complete the program (R. 34, 392-394). The sole remaining legal step necessary to permit the opening of Whitney-Jefferson for business was the issuance by the Comptroller, under

12 U.S.C. §27, of a certificate authorizing it to commence the business of banking. The Comptroller was about to issue such a certificate when this action was filed on June 9, 1962.

The plaintiffs, who are three Louisiana state banks, sought a declaratory judgment and an injunction against the Comptroller prohibiting him from issuing his certificate, on the ground that Whitney-Jefferson was an illegal "branch" of Whitney-New Orleans. The jurisdiction of the District Court was invoked under 28 U.S.C. §1331. Whitney-Jefferson intervened as a defendant. The issuance of the certificate and the opening of the bank were enjoined *pendente lite* first by a temporary restraining order and subsequently by a preliminary injunction.

On June 27, 1962, a bill then before the Louisiana legislature (introduced June 3, 1962; R. 314) was amended by the addition of a new provision which prohibited any bank holding company from opening a new banking subsidiary for business. The bill as so amended was enacted into law as Louisiana Act 275 of 1962, and became effective on July 10, 1962 (R. 290, 300, 296, 301). The plaintiffs in this action thereupon claimed that the Louisiana statute furnished an additional reason why they should prevail. The State Bank Commissioner of Louisiana intervened as a plaintiff on the ground that his duties included the enforcement of the new statute (R. 346-358). The plaintiff banks and the Commissioner are the present respondents.

All parties moved for summary judgment. The District Court held that the Comptroller was precluded from issuing his certificate by the Louisiana statute and further held that this section is constitutional as

applied to national banks. The court declined to decide whether Whitney-Jefferson should be treated as an illegal "branch" of Whitney-New Orleans, 211 F. Supp. at 578, and accordingly made no findings of fact bearing on that question. It did *not* find--nor had respondents asked it to find--that Whitney-New Orleans had ever intended to operate Whitney-Jefferson as a "branch." See R. 444-50. Had respondents raised any such issue of fact, a trial would have been required, since petitioner and the Comptroller, who vigorously denied that there was ever any intent so to operate Whitney-Jefferson, would have introduced evidence in support of their denial. But that issue was neither raised nor decided.

Both the Comptroller and Whitney-Jefferson appealed, and after briefing and oral argument (directed primarily to the constitutionality of the Louisiana statute), the Court of Appeals expressly declined to pass on the constitutional issue decided by the District Court, but instead held that Whitney-Jefferson was in substance an illegal "branch" of Whitney-New Orleans. The court based its decision almost exclusively on statements made by Mr. Keehn W. Berry, President of Whitney-New Orleans, in submitting the Whitney program to the stockholders and to the federal regulatory agencies. The essence of the court's holding was that:

> "The facts . . . show, we think, that Whitney-New Orleans intends to do business through Whitney-Jefferson in the same way as if the institutions were one. The president of Whitney-New Orleans frankly made this quite clear." 323 F.2d at 303, Appendix at 58-59.

The court so held even though Whitney-New Orleans' intent as viewed by the court was clearly not among the undisputed facts on which summary judgment was had in the District Court, and no such view of its intent can be found in the findings of that court. The holding of the Court of Appeals, moreover, wholly ignored the vital question whether, even assuming that Whitney-New Orleans intended to operate Whitney-Jefferson as a branch, it would have found it possible to do so.

REASONS FOR GRANTING THE WRIT

The basic substantive issue presented by this case is whether the location of national banks which are subsidiaries of bank holding companies is to be controlled by state-law restrictions on branch banking, or, as provided in the Federal Bank Holding Company Act of 1956, by the Board of Governors of the Federal Reserve System exercising discretionary powers conferred by that statute. The question whether a separately incorporated national bank should ever, because of the ownership of its stock or for reasons related to such ownership, be considered a "branch" of another bank within the meaning of 12 U.S.C. § 36(c) (and hence subject under the provisions of that section to restrictions on location imposed by state law) is one of great importance to the banking industry and to the federal regulatory agencies. Holding-company banking (control by a bank holding company of two or more banks through stock ownership) and branch banking (conduct of a banking business by a single corporation through more than one office) have developed as alternative and distinct systems by which more than one banking office may be under the same ultimate owner-

ship. Although these systems are similar in some respects, they are fundamentally different.

Concurrent with the development of these two systems has been the development by Congress of quite different statutory patterns for regulating each. This development, which culminated in the enactment of the Federal Bank Holding Company Act of 1956, involved conscious decisions by Congress on a number of occasions as to whether branch banking and holding-company banking should be subject to the same type, or to different types, of federal regulation. Congress has consistently determined that the differing characteristics of the two types of banking make different regulatory treatment more appropriate. And in so deciding and so legislating, Congress has created additional differences between the two systems which flow from the different patterns of regulation themselves. In drafting the Federal Bank Holding Company Act of 1956 Congress specifically considered a proposal to apply state-law restrictions on the location of bank branches to holding-company banking—the result of the decision below—and rejected the proposal as undesirable.

The holding under review is, we submit, clearly inconsistent with these decisions by Congress, and would make it impossible for the federal bank regulatory agencies to apply the pattern of regulation which Congress has prescribed. The decision, moreover, although it purports to be limited to the particular facts of the case, upon analysis casts grave doubt on the legal status of 16 bank holding companies which presently operate 111 banks in ten states which prohibit or limit branch banking (R. 339-342); these existing bank holding companies, as well as future applicants for permission

to become bank holding companies or to increase their holdings of bank stock, are now threatened by the same sort of legal challenge which has so far been successful against petitioner. The question of federal law is therefore one of great importance which has not been, but should be, settled by this Court. It also presents a conflict between circuits; the decision below is impossible to reconcile with that of the Court of Appeals for the Ninth Circuit in *First National Bank in Billings* v. *First Bank Stock Corp.*, 306 F.2d 937 (9th Cir. 1962).

The second question presents one of those infrequent instances where a court of appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Under the Federal Rules it is of particular importance, and this Court has been especially vigilant to ensure, that the summary-judgment procedure not be employed to deprive litigants of a trial when disputed issues of fact are present. The Court of Appeals, in disposing of the present case on the basis of a view of the facts which was never litigated in the District Court, which derives no support from the findings of that court, and which raises disputed questions of fact as to which no evidence was introduced and no trial was had, has departed from established principles in a manner which urgently requires correction.

A. THE DECISION BELOW PRESENTS ISSUES OF GENERAL IMPORTANCE IN THE CONSTRUCTION AND ADMINISTRATION OF THE FEDERAL BANKING LAWS.

The Court of Appeals' decision that one separately incorporated bank may be a "branch" of another presents issues of vital importance in the construction and administration of the national banking laws. In the

century since the enactment of the National Bank Act in 1863, no court has ever, until this case, made such a holding. Branch banking is a specific and clearly understood phenomenon in American banking legislation and banking practice. Its advantages and the restrictions on its use are equally clearly understood. A subsidiary bank of a bank holding company and its proper use are quite different but well defined. The former is as different from the latter as a cow is from a goat. A goat does not become a cow because the prospective purchaser hopes to reap some of the benefits of owning a cow—*e.g.*, to keep the grass down and get milk of a sort.

The Comptroller of the Currency passes on all applications to organize new national banks. 12 U.S.C. §§ 21-27. Many of these applications are submitted by bank holding companies. Many more are submitted by individuals or groups who already have interests in other banks. The holding below amounts to a command to the Comptroller that, before passing on each such application, he must satisfy himself that the applicants have made no statements and given no other indication that their application was motivated by a desire to obtain some of the advantages of branch banking, or that they "intend," in some manner unspecified, unspecifiable, and in any case wholly academic (since the "intention," even if present, would be unattainable), to operate the new bank as though it were a branch. The holding is also, quite obviously, a threat to all persons and corporations with interests in banks who seek to organize new national banks, and an encouragement to the many banks which frequently oppose the creation of any competitive banking facilities in or near their communities to present evidence of such

"intent" to the Comptroller and, that failing, to the courts.

Under the provisions of the Federal Bank Holding Company Act of 1956, the Board of Governors of the Federal Reserve System must give prior approval to every acquisition of the stock of any bank in the United States, whether national or state, by a bank holding company. In the seven years since the enactment of that statute, approximately 81 such applications have been filed with the Board. Since a bank holding company is defined in the Act (12 U.S.C. § 1841 (a)) as a company which owns a 25% interest in two or more banks, there are few if any of the applications passed on by the Board which, if the decision under review is allowed to stand, could not be attacked on gounds similar to those here approved by the Court of Appeals. In one of the first applications to come before the Board after the appellate decision in this case, opponents of the acquisition in fact made such an attack and relied on the decision under review. *First Colorado Bankshares, Inc.*, F.R.B., Nov. 14, 1963. The Board rejected the contention, but without any real discussion of the issues; it is quite clear that, if the decision below is allowed to stand, the issue will be raised many times again, both before the Board and in the courts.

Not only *future* applicants for new banks and new holding-company applicants find themselves threatened by the decision below. At present 16 registered bank holding companies operate 111 banks in ten states which prohibit or limit branch banking (R. 339-342). These banks have resources totaling more than 2.75

billion dollars.[1] A far greater number of banks have interlocking ownership by individuals or by companies which are not defined as bank holding companies by the Federal Bank Holding Company Act. See *Chain Banking: Stockholder and Loan Links of 200 Largest Member Banks*, Report by Wright Patman, Chairman, to the Select Committee on Small Business, 87th Cong. (1963). There has never been any secret about the fact that these various types of common ownership of more than one bank are largely, if not principally, motivated by the desire to obtain such of the advantages of branch banking as are legally possible thereby.[2] In the case of many or most of the hundreds of banks whose stockholders (individual or corporate) have interests in other banks, it would doubtless be possible to find statements concerning the purpose of the common ownership far more indicative of an intent to obtain some of the advantages of branch banking than was the case here.[3] If the decision below is permitted to stand, each of these banks will be subject to the

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[1] This figure is a composite approximation derived from Rand McNally's *Bankers' Directory* (final 1963 ed.).

[2] See, *e.g.*, Board of Governors of the Federal Reserve System, "Branch, Chain, and Group Banking," in *Banking Studies* (1941); testimony of John W. Pole, Comptroller of the Currency, *Hearings Before the House Committee on Banking and Currency under H. Res. 141 (Group, Chain and Branch Banking)*, 71st Cong., 2d Sess., Vol. 1, Part 1, pp. 5-26 (1930); H. R. Rep. No. 609, 84th Cong., 1st Sess. 6 (1955); Fischer, *Bank Holding Companies* 1, 23, 138 (1961).

[3] For a case where such statements were made but were deemed wholly insufficient to make the new bank a "branch," see Camden Trust Co. v. Gidney, 112 U.S. App. D.C. 197, 301 F.2d 521, *cert. denied*, 369 U.S. 886 (1962).

serious threat of actions brought by their competitors claiming that they are illegal "branches."

The contention which now bears the stamp of approval of the Court of Appeals for the D.C. Circuit is wholly erroneous. Congress has, since the enactment of the McFadden Act, 44 Stat. 1224 (1927), the predecessor of the present 12 U.S.C. § 36(c), permitted and regulated the establishment of branches by national banks. In 1933, by the enactment of a series of provisions (presently 12 U.S.C. §§ 61, 161, 221a, 334, 481) regulating bank holding companies, and in 1956, with the enactment of the Federal Bank Holding Company Act, Congress chose to subject holding-company banking to a quite different pattern of regulation. And Congress did this in the full knowledge that the two types of banking possess many similarities, that holding companies are often organized because branch banking is forbidden, and that holding-company-owned banks can, and often do, have the same management and policies. *Hearings Before the House Committee on Banking and Currency Under House Resolution 141 (Group, Chain and Branch Banking)*, 71st Cong., 2d Sess., Vol. 1, Part 1, pp. 5, 26 (1930).

Most conclusive of all, Congress considered including in the Federal Bank Holding Company Act of 1956 a provision subjecting holding-company banking to the same limitations as to location that apply to branch banking—the precise issue involved in this case—and rejected the proposal on the ground that the two types of banking should in this respect be treated differently. This Act (12 U.S.C. §§ 1841-1848) was passed after 18 years of Congressional study. In the early drafts of the bill, efforts were made in both the House and the Senate (H.R. 6227 and S. 880, 84th Cong.,

1st Sess.) to make bank-holding-company operations subject to the restrictions on branch banking. The proposed provision read:

> "Notwithstanding any other provisions of this section, no application shall be approved under this section which will permit . . . (2) any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank, except (i) within geographic limitations that would apply to the establishment of branches of banks under the statute law of such state. . . ."

This provision would have accomplished the precise result in this case—the result which respondents claim had been accomplished by the enactment of Section 36(c) 22 years prevjously. The proposal would have made holding-company susidiaries the equivalent of "branches" and would have prohibited them where state law prohibits branches.

This proposed provision was included in the bill as passed by the House of Representatives. Extended testimony and arguments for and against the provision were presented to the Senate Subcommittee on Banking and Currency. *Hearings before a Subcommittee of the Committee on Banking and Currency, United States Senate (Control of Bank Holding Companies)*, 84th Cong., 1st Sess., pp. 45, 47-48, 77-78, 80-82, 85, 89-90, 104-105, 107, 111, 112-129 (1955). The Senate Committee, after full consideration, reported to the Senate a bill (S. 2577) which eliminated the proposed tie-in with the branch-banking law. The

Committee gave its reasons for rejecting that proposal as follows:

> "The committee decided against the inclusion of a provision in the bill that would automatically apply State laws concerning branch banking to bank holding company operations. The purposes of branch banking laws are not identical with the purpose of this bill to control bank holding companies. Moreover, branch banking is mostly conducted by the use of depositors' funds, thus making the protection of these funds of prime importance. Bank holding companies, however, as such have no depositors. For operating funds they have recourse to equity capital supplied by their shareholders. It is believed the bill contains adequate provisions to regulate bank holding company operations without an arbitrary tie-in with branch banking laws." S. Rep. No. 1095, 84th Cong., 2d Sess., Part 1, p. 11 (1956).

The statute as enacted omits the proposed tie-in with the branch-banking law which had been debated so exhaustively. It expressly permits the purchase of bank stock by a bank holding company upon approval by the Federal Reserve Board. The statute lists five statutory factors which the Board is to consider in deciding whether to approve or disapprove an application for such a purchase. (12 U.S.C. § 1842 (c)). The statute conspicuously refrains from providing that the application must be disapproved if Section 36(c) would prohibit the establishment of a branch bank in the same circumstances. That proposal Congress had expressly rejected.

The Court of Appeals in its decision never mentioned the Federal Bank Holding Company Act of 1956 or the considered congressional policy of treating branch banking and holding-company banking differently. The court's decision rests on its assertion that the Whitney officials *intended* to operate Whitney-Jefferson as though it were a branch. The answer is twofold: first, there is no proof that they intended anything of the sort, and this issue was neither submitted to nor decided by the District Court (see Section B, page 21 *infra*); and second, even if they had so intended, it would have been wholly impossible for them to carry any such intention into effect. This is so primarily because of the regulatory scheme laid down by Congress itself, which has ensured that the powers and characteristics of bank branches and of separately incorporated holding-company-owned banks are quite different.

For example, Whitney-Jefferson has its own separate capital structure and deposits; in bankruptcy a depositor would have claims against the deposits of Whitney-Jefferson alone (12 U.S.C. §§ 91, 93, 191-200; R. 389). Comprehensive provisions of law ensure against any mingling of capital, assets, or obligations of two subsidiaries of the same bank holding company, and make it impossible for them to be operated as though their resources were pooled (12 U.S.C. § 1845), or for one to incur debts based on anything but its own separate capital stock (12 U.S.C. § 82). Whitney-Jefferson can make no loan larger than $60,000, while if it were a branch of Whitney-New Orleans, it could make a loan of up to $3,000,000 (12 U.S.C. § 84; R. 389). The rights of Whitney Holding Corporation as shareholder of the two banks are quite different from

and more limited than the rights of shareholders in a single bank having more than one branch (12 U.S.C. § 61).

The decision below, moreover, cannot be reconciled with *First National Bank in Billings* v. *First Bank Stock Corp.*, 306 F.2d 937 (9th Cir. 1962), in which a claim identical to that approved in the present case was made and rejected. Perhaps the best method of demonstrating how clearly the two cases require the same result is to recite the only grounds for distinction that the court below could find. It said:

> "The Billings case is far from being factually 'on all fours' with the present case. There the company was organized in 1929, and had been operating in that capacity for 30 years. It possessed stock in 87 banks with 94 offices. Thus, it was not created or organized by a bank, as Whitney Holding was, solely for the purpose of opening a branch office of that bank. It was the traditionally recognized bank holding company which, with its own capital, invests in or buys the stock of banks. It was not the type of holding company here involved, whose only capital was the money siphoned through it by Whitney-New Orleans to open Whitney-Jefferson in a prohibited location." 323 F.2d at 303, Appendix at 58.

The attempted distinction is, we submit, completely illusory. Whitney Holding Corporation precisely meets the description of "the traditionally recognized bank holding company which, with its own capital, invests in or buys the stock of banks." The fact that the funds which became Whitney-Jefferson's capital came originally from Whitney-New Orleans furnishes

no ground of distinction. The court in *Billings* attached no relevance to the original source of the capital of Valley, the alleged "branch"; in fact, it never mentioned where the holding company got the funds to capitalize Valley. But since the principal source of income of bank holding companies is dividends paid by their subsidiary banks, it is overwhelmingly probable that in *Billings* the initial capital of the alleged "branch" came originally from the same source as in this case, that is, from funds available for dividends in the member banks of the holding-company system. The court in Billings regarded the decisive tests as whether the two banks did business "in the same way as if the institutions were one," 306 F.2d at 942, a test to which the original source of capital is quite irrelevant.[4]

As to the fact that the holding company in *Billings* was organized in 1929 and owns stock in 87 banks, it is difficult to see what significance the D.C. court attached to these facts. One would suppose that, if for a holding company to own two banks amounts to "branch banking," then for another holding company to own 87 banks (mostly in states which prohibit or severely limit branch banking, R. 339-342), in whose management it "participates actively," 306 F.2d at 942, would be a far more serious "evasion" of the branch-

[4] In Camden Trust Co. v. Gidney, 112 U.S. App. D.C. 197, 301 F.2d 521, *cert. denied*, 369 U.S. 886 (1962), a case identical to the present one except that the owners of the two banks were individuals rather than a corporation, the District of Columbia court itself recognized that the provisions of Federal law discussed above prevented two banks under the same ownership from being operated as though they were one. While the decision under review attempts to distinguish *Camden*, the substance and rationale of the two cases are irreconcilable.

banking law. As to the purpose for which the holding company in *Billings* was organized (a subject not considered important enough for discussion by the court in that case), the Comptroller's Annual Report for 1929, the year in which that company was organized, contained the following:

> "However, these holding companies are attempting to do under the sanction of existing laws, which are crudely adapted to the purpose, what should be made possible in a simpler manner by new legislation. If branch banking were permitted to be extended from the adequately capitalized large city banks to the outlying communities within the economic zone of operations of such banks, there would be no logical reason for the existence of the local holding company and it would give way to a system of branches operated directly by the central bank of the group.", Comptroller of the Currency, *Annual Report, 1929*, pages 4-5.

It is impossible, therefore, to avoid the conclusion that the decision in the present case has created a substantial and important conflict between the Courts of Appeals for the Ninth Circuit and the District of Columbia Circuit, which this Court should resolve.

B. THE COURT OF APPEALS SERIOUSLY DEPARTED FROM PROPER PROCEDURAL STANDARDS IN DETERMINING A DISPUTED ISSUE OF FACT ON MOTIONS FOR SUMMARY JUDGMENT.

There is probably no rule of federal civil procedure concerning which this Court has been more unequivocal and solicitous than the salutary rule that a case may not be disposed of on a motion for summary judgment if there is any disputed issue of fact re-

quiring a trial. On many occasions the Court has reversed lower-court decisions for failure to comply with this rule; *e.g., Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (an issue of intent, as in the present case); *Fountain* v. *Filson*, 336 U.S. 681; *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249; *Eccles* v. *Peoples Bank of Lakewood Village*, 333 U.S. 426; *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620. In the *Eccles* case, *supra*, the Court held that summary judgment on affidavits is particularly inappropriate when the proceedings are declaratory and equitable in nature and when issues of public importance are involved, both of which conditions are present here. 333 U.S. at 434.

The decision below presents a particularly aggravated departure from the undoubted rule, and requires correction by this Court. The basis for the holding of the Court of Appeals consisted almost entirely of factual inferences made by it from statements made by Mr. Berry, President of Whitney-New Orleans, in explaining the Whitney program to the stockholders and to the federal regulatory agencies. These statements had been filed by the parties as exhibits to their various motions and affidavits. They were not testimony; they were not made under oath; there was no opportunity for Mr. Berry to be called as a witness to explain what he had meant by them. The District Court never discussed them, since it decided the case on an issue to which they were irrelevant; the District Court's findings of fact and conclusions of law contain no mention of them. Yet the Court of Appeals drew the following inference:

> "The facts already recited sufficiently show, we think, that Whitney-New Orleans intends to do

> business through Whitney-Jefferson in the same way as if the institutions were one. The President of Whitney-New Orleans frankly made this quite clear." 323 F.2d at 303, Appendix at 58-59.

Intent, of course, is a question of fact; this Court has specifically held that summary procedures should be used sparingly "where motive and intent play leading roles." *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473. Petitioner most vigorously denies that Mr. Berry or any one else in the management of Whitney-New Orleans ever intended to operate Whitney-Jefferson "in the same way as if the institutions were one." The statements relied upon by the court do not prove this; and even if it should be thought that they permit such an inference, Whitney-Jefferson is entitled to offer evidence to rebut that inference at a trial.

The Court's treatment of Mr. Berry's statements provides an excellent example of how unsound and dangerous it is for an appellate court to speculate as to questions of fact on the basis of a bare documentary record, without a trial or any opportunity for testimony, explanation, or cross-examination. All the statements by Mr. Berry in the record, both those upon which the Court relies and those which it does not mention, may be fairly summarized as follows:

> He intended (1) not to operate Whitney-Jefferson as a branch of Whitney-New Orleans, but rather
>
> (2) to operate it as a member of the same holding-company system, in order
>
> (3) to obtain as many of the advantages of

branch banking as are available under that different system of organization.

Moreover, the sworn and uncontradicted affidavit of James Gilly, Jr., President of Whitney-Jefferson (R. 388-391), affirmatively shows that it was *not* intended to operate Whitney-Jefferson as though it and Whitney-New Orleans were one. That affidavit shows, among other things, that "Whitney-Jefferson will operate a banking house entirely separate from that of the Whitney-New Orleans" (R. 388); that Whitney-New Orleans and Whitney-Jefferson would have only one officer or employee in common, and that the two boards of directors would be by no means identical; that Whitney-Jefferson would establish correspondent banking relations not only with Whitney-New Orleans, but with other banks as well; that Whitney-Jefferson is a member in its own right of the Federal Reserve System, and has subscribed to and paid for stock in the Federal Reserve Bank of Atlanta; that Whitney-Jefferson "has and will maintain its own books of account and its own stationery, checks and forms, none of which mention Whitney-New Orleans" (R. 389); that no customer of Whitney-Jefferson would have any contractual right to make deposits at or withdraw funds from Whitney-New Orleans for his account at Whitney-Jefferson, or vice versa; and that Whitney-Jefferson would follow normal banking practices regarding accepting deposits for accounts in, and cashing checks drawn on, other banks, including Whitney-New Orleans.

In view of the uncontroverted sworn statements in this affidavit, the Court could not reasonably conclude, even if the issue were relevant and had been properly

presented, that it was intended to operate the two institutions as though they were one. "The unitary type of operation characteristic of branch banking is not present." *First National Bank in Billings* v. *First Bank Stock Corp.*, 306 F.2d 937, 943 (9th Cir. 1962).

So far from being an "undisputed fact" capable of supporting a summary judgment, Mr. Berry's supposed intent to operate the two banks as one cannot even be found as an allegation by respondents. Neither in their complaint (R. 6-20) nor in their Statement of Facts in support of their motion for summary judgment (R. 75-93) did they allege anything of the kind. Appellees did allege that Whitney-Jefferson was in law a "branch" and that the purpose of the Whitney program was to "evade" the branch banking laws; but these are patently conclusory assertions which do not amount to an allegation of fact regarding Whitney-New Orleans' intent as to how it would operate Whitney-Jefferson. Petitioner's Statement of Material Facts (R. 318-323) contained nothing concerning the intent of Whitney-New Orleans in this regard, since no allegation relating thereto had been made by the appellees and since petitioner did not believe that any such question of intent was relevant to any issue in the litigation.

The court's holding therefore rests on a finding of fact which it itself initially made, without support in the decision of the District Court; and this finding of fact is one which petitioner vigorously disputes and which, in our submission, is affirmatively refuted by the record. This procedure is wholly inadmissible, and goes far beyond the well-recognized limitations on the circumstances in which summary judgment is proper.

If a Court of Appeals, in reviewing a case in which summary judgment was granted, comes to the conclusion that the decisive issue is a question of fact which either is disputed or which has not been adequately developed in the proceeding below, the proper disposition is, of course, to remand the case to the District Court for a trial. On the view which the Court of Appeals took of the present case, that procedure should have been followed here.

C. RESPONDENTS' SOLE REMEDY IS A REVIEW PROCEEDING IN A COURT OF APPEALS AS PROVIDED IN THE BANK HOLDING COMPANY ACT.

As already noted, under the Bank Holding Company Act of 1956 it is the Federal Reserve Board that has the duty of passing upon applications for the formation of bank holding companies and for the acquisition of banks by existing bank holding companies. The Board discharged that duty in this case. Congress further provided that the Board's decisions should be subject to review in an appropriate Court of Appeals, 12 U.S.C. § 1848. The instant suit is a patent attempt to circumvent the statutory mode of review, to attack the Board's decision collaterally by the device of a suit in equity against the Comptroller of the Currency. For this reason alone, the judgment below must be reversed for lack of jurisdiction. This question will be fully treated in the petition for certiorari of the Comptroller in *James J. Saxon, Comptroller of the Currency* v. *Bank of New Orleans and Trust Co.*

CONCLUSION

Wherefore, petitioner prays that a writ of certiorari issue from this honorable Court to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in *Whitney National Bank in Jefferson Parish* v. *Bank of New Orleans and Trust Co., et al.*

Respectfully submitted,

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January, 1964.

APPENDIX

STATUTES INVOLVED

§ 26. Comptroller to determine if association can commence business

Whenever a certificate is transmitted to the Comptroller of the Currency, as provided in this chapter, and the association transmitting the same notifies the comptroller that all of its capital stock has been duly paid in, and that such association has complied with all the provisions of this chapter required to be complied with before an association shall be authorized to commence the business of banking, the comptroller shall examine into the condition of such association, ascertain especially the amount of money paid in on account of its capital, the name and place of residence of each of its directors, and the amount of the capital stock of which each is the owner in good faith, and generally whether such association has complied with all the provisions of this chapter required to entitle it to engage in the business of banking; and shall cause to be made and attested by the oaths of a majority of the directors, and by the president or cashier of the association, a statement of all the facts necessary to enable the comptroller to determine whether the association is lawfully entitled to commence the business of banking. As amended Sept. 8, 1959, Pub.L. 86-230, § 2, 73 Stat. 457.

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§ 27. Certificate of authority to commence banking

If, upon a careful examination of the facts so reported, and of any other facts which may come to the knowledge of the comptroller, whether by means of a special commission appointed by him for the purpose of inquiring into the condition of such association, or otherwise, it appears that such association is lawfully entitled to commence the business of banking, the comptroller shall give to such association a certificate, under his hand and official seal, that such association has complied with all the provisions required to be complied with before commencing the business of banking, and that such association is authorized to commence such business. But the comptroller may with-

hold from an association his certificate authorizing the commencement of business, whenever he has reason to suppose that the shareholders have formed the same for any other than the legitimate objects contemplated by this chapter. R. S. § 5169.

* * * *

§ 36. Branch banks

The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:

* * * *

(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. In any State in which State banks are permitted by statute law to maintain branches within county or greater limits, if no bank is located and doing business in the place where the proposed agency is to be located, any national banking association situated in such State may, with the approval of the Comptroller of the Currency, establish and operate, without regard to the capital requirements of this section, a seasonal agency in any resort community within the limits of the county in which the main office of such association is located, for the purpose of receiving and paying out deposits, issuing and cashing checks and drafts, and doing business incident thereto: *Provided*, That any permit issued under this sentence shall be revoked upon the opening of a State or national bank in such community. Except as provided in the immediately preceding sentence, no such association shall establish a branch outside of the city, town, or village in which it is situated unless it has a combined capital stock and surplus equal to the combined

amount of capital stock and surplus, if any, required by the law of the State in which such association is situated for the establishment of such branches by State banks, or, if the law of such State requires only a minimum capital stock for the establishment of such branches by State banks, unless such association has not less than an equal amount of capital stock. As amended July 15, 1952, c. 753, § 2(b), 66 Stat. 633; Sept. 28, 1962, Pub.L. 87-721, 76 Stat. 667.

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§ 1841. Definitions

(a) "Bank holding company" means any company (1) which directly or indirectly owns, controls, or holds with power to vote, 25 per centum or more of the voting shares of each of two or more banks or of a company which is or becomes a bank holding company by virtue of this chapter, or (2) which controls in any manner the election of a majority of the directors of each of two or more banks, or (3) for the benefit of whose shareholders or members 25 per centum or more of the voting shares of each of two or more banks or a bank holding company is held by trustees; and for the purposes of this chapter, any successor to any such company shall be deemed to be a bank holding company from the date as of which such predecessor company became a bank holding company. Notwithstanding the foregoing (A) no bank shall be a bank holding company by virtue of its ownership or control of shares in a fiduciary capacity, except where such shares are held for the benefit of the shareholders of such bank, (B) no company shall be a bank holding company which is registered under the Investment Company Act of 1940, and was so registered prior to May 15, 1955 (or which is affiliated with any such company in such manner as to constitute an affiliated company within the meaning of such Act), unless such company (or such affiliated company), as the case may be, directly owns 25 per centum or more of the voting shares of each of two or more banks, (C) no company shall be a bank holding company by virtue of its ownership or control of shares acquired by it in connection with its underwriting of securities and which are held only for such period of time as will permit the sale thereof upon a reasonable basis, (D) no company formed for the sole purpose of participating in a proxy solicitation shall be a bank holding company by virtue of its control of voting rights of shares acquired in

the course of such solicitation, and (E) no company shall be a bank holding company if at least 80 per centum of its total assets are composed of holdings in the field of agriculture.

(b) "Company" means any corporation, business trust, association, or similar organization, but shall not include (1) any corporation the majority of shares of which are owned by the United States or by any State, or (2) any corporation or community chest, fund, or foundation, organized and operated exclusively for religious, charitable, or educational purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, or (3) any partnership.

(c) "Bank" means any national banking association or any State bank, savings bank, or trust company, but shall not include any organization operating under sections 611 and 612 of this title, or any organization which does not do business within the United States. "State member bank" means any State bank which is a member of the Federal Reserve System. "District bank" means any State bank organized or operating under the Code of Law for the District of Columbia.

(d) "Subsidiary", with respect to a specified bank holding company, means (1) any company 25 per centum or more of whose voting shares (excluding shares owned by the United States or by any company wholly owned by the United States) is owned or controlled by such bank holding company; or (2) any company the election of a majority of whose directors is controlled in any manner by such bank holding company; or (3) any company 25 per centum or more of whose voting shares are held by trustees for the benefit of the shareholders or members of such bank holding company.

(e) The term "successor" shall include any company which acquires directly or indirectly from a bank holding company shares of any bank, when and if the relationship between such company and the bank holding company is such that the transaction effects no substantial change in the control of the bank or beneficial ownership of such shares of such bank. The Board may, by regulation, further define the term "successor" to the extent necessary to prevent evasion of the purposes of this chapter.

(f) "Board" means the Board of Governors of the Federal Reserve System.

(g) "Agriculture," as used in subsection (a) of this section, includes farming in all its branches including fruit-growing, dairying, the raising of livestock, bees, fur-bearing animals, or poultry, forestry or lumbering operations, and the production of naval stores, and operations directly related thereto. May 9, 1956, c. 240, § 2, 70 Stat. 133.

* * * *

§ 1842. Acquisition of bank shares or assets—prior approval of Board as necessary; exceptions

(a) It shall be unlawful except with the prior approval of the Board (1) for any action to be taken which results in a company becoming a bank holding company under section 1841(a) of this title; (2) for any bank holding company to acquire direct or indirect ownership or control of any voting shares of any bank if, after such acquisition, such company will directly or indirectly own or control more than 5 per centum of the voting shares of such bank; (3) for any bank holding company or subsidiary thereof, other than a bank, to acquire all or substantially all of the assets of a bank; or (4) for any bank holding company to merge or consolidate with any other bank holding company. Notwithstanding the foregoing this prohibition shall not apply to (A) shares acquired by a bank, (i) in good faith in a fiduciary capacity, except where such shares are held for the benefit of the shareholders of such bank, or (ii) in the regular course of securing or collecting a debt previously contracted in good faith, but any shares acquired after May 9, 1956 in securing or collecting any such previously contracted debt shall be disposed of within a period of two years from the date on which they were acquired; or (B) additional shares acquired by a bank holding company in a bank in which such bank holding company owned or controlled a majority of the voting shares prior to such acquisition.

Application for approval; notice to Comptroller of Currency or State authority; disapproval; hearing; order of Board

(b) Upon receiving from a company any application for approval under this section, the Board shall give notice to the Comptroller of the Currency, if the applicant company or any bank the voting shares or assets of which are sought to be acquired is a national banking association or District bank, or to the appropriate supervisory authority of the interested State, if the applicant company or any bank the voting shares or assets of which are sought to be acquired is a State bank, and shall allow thirty days within which the views and recommendations of the Comptroller of the Currency or the State supervisory authority, as the case may be, may be submitted. If the Comptroller of the Currency or the State supervisory authority so notified by the Board disapproves the application in writing within said thirty days, the Board shall forthwith give written notice of that fact to the applicant. Within three days after giving such notice to the applicant, the Board shall notify in writing the applicant and the disapproving authority of the date for commencement of a hearing by it on such application. Any such hearing shall be commenced not less than ten nor more than thirty days after the Board has given written notice to the applicant of the action of the disapproving authority. The length of any such hearing shall be determined by the Board, but it shall afford all interested parties a reasonable opportunity to testify at such hearing. At the conclusion thereof, the Board shall by order grant or deny the application on the basis of the record made at such hearing.

Factors governing determination of application for approval

(c) In determining whether or not to approve any acquisition or merger or consolidation under this section, the Board shall take into consideration the following factors: (1) the financial history and condition of the company or companies and the banks concerned; (2) their prospects; (3) the character of their management; (4) the convenience, needs, and welfare of the communities and the area concerned; and (5) whether or not the effect of such acquisi-

tion or merger or consolidation would be to expand the size or extent of the bank holding company system involved beyond limits consistent with adequate and sound banking, the public interest, and the preservation of competition in the field of banking.

Limitation by State boundaries

(d) Notwithstanding any other provision of this section, no application shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which such bank holding company maintains its principal office and place of business or in which it conducts its principal operations unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication. May 9, 1956, c. 240, § 3, 70 Stat. 134.

* * * * * *

§ 1845. Investments and borrowing by subsidiaries—Securities of parent holding company or other subsidiary, collateral security; purchase of securities under repurchase agreement; loans, discount or extension of credit

(a) From and after May 9, 1956, it shall be unlawful for a bank—

(1) to invest any of its funds in the capital stock, bonds, debentures, or other obligations of a bank holding company of which it is a subsidiary, or of any other subsidiary of such bank holding company;

(2) to accept the capital stock, bonds, debentures, or other obligations of a bank holding company of which it is a subsidiary or any other subsidiary of such bank holding company, as collateral security for advances made to any person or company: *Provided, however*, That any bank may accept such capital stock, bonds, debentures, or other obligations as security for debts previously contracted, but such collateral shall not be held for a period of over two years;

(3) to purchase securities, other assets or obligations

under repurchase agreement from a bank holding company of which it is a subsidiary or any other subsidiary of such bank holding company; and

(4) to make any loan, discount or extension of credit to a bank holding company of which it is a subsidiary or to any other subsidiary of such bank holding company.

Non-interest-bearing deposits to the credit of a bank shall not be deemed to be a loan or advance to the bank of deposit, nor shall the giving of immediate credit to a bank upon uncollected items received in the ordinary course of business be deemed to be a loan or advance to the depositing bank.

Exemptions

(b) The provisions of this section shall not apply (1) to the capital stock, bonds, debentures, or other obligations of any company described in section 1843(c) (1) of this title, or (2) to any company whose subsidiary status has arisen out of a bona fide debt to the bank contracted prior to the date of the creation of such status, or (3) to any company whose subsidiary status exists by reason of the ownership or control of voting shares thereof by the bank as executor, administrator, trustee, receiver, agent, or depositary, or in any other fiduciary capacity, except where such shares are held for the benefit of all or a majority of the stockholders of such bank. May 9, 1956, c. 240, § 6, 70 Stat. 137.

§ 1846. Reservation of rights to States

The enactment by the Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof. May 9, 1956, c. 240, § 7, 70 Stat. 138.

§ 1847. Penalties

Any company which willfully violates any provision of this chapter, or any regulation or order issued by the Board pursuant thereto, shall upon conviction be fined not more than $1,000 for each day during which the violation continues. Any individual who willfully participates in a violation of any provision of this chapter shall upon conviction be fined not more than $10,000 or imprisoned not

more than one year, or both. Every officer, director, agent, and employee of a bank holding company shall be subject to the same penalties for false entries in any book, report, or statement of such bank holding company as are applicable to officers, directors, agents, and employees of member banks for false entries in any books, reports, or statements of member banks under section 1005 of Title 18. May 9, 1956, c. 240, § 8, 70 Stat. 138.

§ 1848. Judicial review

Any party aggrieved by an order of the Board under this chapter may obtain a review of such order in the United States Court of Appeals within any circuit wherein such party has its principal place of business, or in the Court of Appeals in the District of Columbia, by filing in the court, within sixty days after the entry of the Board's order, a petition praying that the order of the Board be set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the Board shall certify and file in the court a transcript of the record made before the Board. Upon the filing of the transcript the court shall have jurisdiction to affirm, set aside, or modify the order of the Board and to require the Board to take such action with regard to the matter under review as the court deems proper. The findings of the Board as to the facts, if supported by substantial evidence, shall be conclusive. May 9, 1956, c. 240, § 9, 70 Stat. 138.

* * * *

WHITNEY NATIONAL BANK IN JEFFERSON PARISH, APPELLANT,

v.

BANK OF NEW ORLEANS AND TRUST COMPANY ET AL., APPELLEES

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY, APPELLANT,

v.

BANK OF NEW ORLEANS AND TRUST COMPANY ET AL., APPELLEES

Nos. 17672, 17681

United States Court of Appeals District of Columbia Circuit.

Argued May 24, 1963.

Decided Aug. 14, 1963.

Petition for Rehearing En Banc Denied Oct. 17, 1963.

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Mr. Dean Acheson, Washington, D. C., with whom Messrs. W. Graham Claytor, Jr., and Brice M. Clagett, Washington, D. C., were on the brief, for appellant in No. 17,672.

Mr. David L. Rose, Atty., Dept. of Justice, with whom Messrs. David C. Acheson, U. S. Atty., and Joseph D. Guilfoyle, Director of Operations, Civil Div., Dept. of Justice, and Morton Hollander, Atty., Dept. of Justice, were on the brief, for appellant in No. 17,681.

Mr. Edward L. Merrigan, Washington, D. C., for appellee Bank of New Orleans & Trust Co. and certain other appellees.

Mr. Bentley G. Byrnes, New Orleans, La., with whom Mr. Edward L. Merrigan, Washington, D. C., was on the brief, for appellee Louisiana State Bank Commissioner.

Mr. James F. Bell, Washington, D. C., filed a brief on

behalf of the National Ass'n of Supervisors of State Banks, as amicus curiae, urging affirmance.

Before WILBUR K. MILLER, WASHINGTON and DANAHER, Circuit Judges.

WILBUR K. MILLER, Circuit Judge.

The City of New Orleans, Louisiana, is co-terminous with the Parish of Orleans in which it is located. It is south of and adjacent to that part of Jefferson Parish which lies east of the Mississippi River. The latter is a populous area, already commercially and industrially active, in which further development is expected to be rapid and extensive.

The Whitney National Bank of New Orleans, by far the largest bank in Louisiana, with its main office and numerous branches in Orleans Parish, draws a substantial volume of business from customers in east Jefferson Parish. For some time it has desired to extend its operations into that area, but cannot establish branches therein because a Louisiana statute,[1] which is construed as forbidding such expansion by state banks, is made applicable to national banks in Louisiana by a federal statute.[2]

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[1] 2 LSA-R.S. 6:54 (1951).

[2] Title 12 U.S.C. § 36 provides in pertinent part.

"*Branch banks*

"The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:

* * * * * * *

"(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and

After several years of studying alternate methods of doing indirectly what these statutes prohibited it from doing directly, The Whitney National Bank of New Orleans finally decided upon a corporate reorganization, the details of which included the formation of a holding company to own two new national banks: Crescent City National Bank, a mere conduit to exist temporarily in name only, and Whitney National Bank in Jefferson Parish, to be operated as we shall describe. All three new organizations were to be financed with funds furnished by Whitney of New Orleans.

Through elaborate maneuvers which will be explained later, the result would be that Whitney Holding Corporation would own all the stock, except qualifying shares, of Whitney of New Orleans and Whitney, in Jefferson Parish; and the shares of Whitney Holding Corporation would be owned by the shareholders of the original Whitney of New Orleans in the same proportion as before. The holding company feature of the plan required the approval of the Board of Governors of the Federal Reserve System, and the remainder of it required the approval of the Comptroller of the Currency.

Commenting on the proposed plan, Whitney's president on October 28, 1961, advised his shareholders it had been decided to use the holding company device instead of the "affiliated" bank plan which we approved in the Camden Trust case[3] largely because, under the latter arrange-

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subject to the restrictions as to location imposed by the law of the State on State banks. * * *

* * * * * * * *

"(e) No branch of any national banking association shall be established * * * without first obtaining the consent and approval of the Comptroller of the Currency.

"(f) The term 'branch' as used in this section shall be held to include *any branch bank, branch office, branch agency, additional office, or any branch place of business* located in any State * * * at which deposits are received, or checks paid, or money lent." (Emphasis supplied.)

[3] Camden Trust Company v. Gidney, 112 U.S.App.D.C. 197, 301 F.2d 521, cert. denied, 369 U.S. 886, 82 S.Ct. 1158, 8 L.Ed.2d 287 (1962).

ment, it is impossible to attain and preserve identity of ownership of the two banks. He said:

> "* * * From the depositors [*sic*] point of view, those in the smaller bank will be assured of the same management which directs the larger one without possibility of interruption. They will be assured of access to the large loan limits of the combined banks. They will have the security which arises out of the fact that the large and the small bank have identical ownership as well as management.
>
> "We * * * elected to use a holding company rather than to get a group of stockholders to form an affiliate in Jefferson Parish. An affiliate by law must depend on ownership of a majority of the stock in the Jefferson Parish bank by Whitney Bank stockholders. Affiliate relationship can be suddenly terminated if stock ownership in the Jefferson Parish bank changes over a period of time until control ceases to be in the stockholders of the large New Orleans bank. This large bank cannot control those changes in stock ownership, and under the law when the control ceases to be in the stockholders of the large bank the two banks cannot have common officers or directors. As we view it, the change of ownership of the stock could be very embarrassing to either or both banks,—even to the extent of having a bank which we no longer control still bearing the name 'Whitney National Bank.'
>
> "Under the holding company approach the relationship is completely owned by the stockholders of the holding company who will be all the present stockholders of the Whitney National Bank and their successors.
>
> "By reason of the common ownership of the two banks in a holding company there can arise no conflict of interest between them as there can between affiliated banks. There will be no minority stockholders to be affected.
>
> "From the customer point of view there will be no conflict of interest arising out of the manner in which the customer sees fit to divide his business between the commonly owned banks in the two parishes. He

will have the full benefit of a relationship with the large bank and its officers.

"Because of the permanent relationship between the large and the smaller bank, the smaller one can operate safely with a smaller capitalization."

This plan was carried out almost completely. Whitney of New Orleans organized the Whitney Holding Corporation with $350,000 initial capital furnished by it, with which Whitney Holding acquired the "phantom"[4] Crescent City National Bank. The Whitney Bank then by consolidation transferred its assets to Crescent City National Bank (owned by Whitney Holding) and immediately changed Crescent City's name to The Whitney National Bank of New Orleans. Then the new Whitney of New Orleans furnished the Holding Corporation with $650,000[5] with which the latter organized The Whitney National Bank in Jefferson Parish. And all the Holding Corporation's capital stock was distributed proportionately to the stockholders of the original Whitney of New Orleans.

All this was done with the approval of the Board of Governors of the Federal Reserve System (which had the duty of passing on the validity of the holding company arrangement) and of the Comptroller of the Currency. The only step not yet taken is the Comptroller's issuance to The Whitney National Bank in Jefferson Parish of a Certificate of Authority which will enable it to begin business.

On June 9, 1962 three Louisiana state banks[6] filed this

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[4] It was so characterized by the Federal Reserve Board of Governors. Crescent City never opened for business and was not intended to do so.

[5] This payment was described as a dividend.

[6] Bank of New Orleans and Trust Company, located in Orleans Parish, Merchants Trust and Savings Bank, located in the eastern portion of Jefferson Parish, and Guaranty Bank and Trust Company, located in Lafayette Parish.

On June 26, 1962, Merchants Trust and Savings Bank moved, in its own behalf only, to dismiss the action and so withdrew as a party plaintiff. The Bank of Louisiana in New Orleans was

suit against the Comptroller of the Currency, James J. Saxon, in the United States District Court for the District of Columbia. Their complaint, after describing Whitney's plan of reorganization and the various steps already taken pursuant to it, alleged that the Comptroller

> "(19.) • • • is presently considering almost immediate issuance of his Certificate or Certificates of Authority which will enable the new branch bank facility to open and commence to operate a banking business at one or more locations in Jefferson Parish under the name of Whitney National Bank of Jefferson Parish.
>
> "(20.) Plaintiffs verily believe that defendant, unless enjoined, will, without any notice of intention to plaintiffs, issue in the name of Whitney National Bank of New Orleans, or Whitney Holding Corporation, or Whitney National Bank of Jefferson Parish the aforesaid Certificate or Certificates of Authority, all in contravention of the letter, intent and purposes of Title 12 U.S.C. §§ 27, 36 and 1841, et seq., and that after said Certificate or Certificates are issued as aforesaid, plaintiffs will have no adequate remedy at law, either to compel revocation of same or to prevent the Whitney Bank from so operating in Jefferson Parish.
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> "(21.) Plaintiffs further allege that the unlawful and arbitrary issuance by defendant of his certificate or certificates, authorizing the Whitney National Bank to open and operate a new branch facility or facilities in Jefferson Parish as aforesaid will cause great and irreparable damage to the banking business of said plaintiffs • • •."

The relief prayed for was a declaration that 12 U.S.C. §§ 27, 36 and 1841 et seq., prohibit the Comptroller from

allowed to intervene as a plaintiff on July 5, and on July 10 intervention of Whitney of Jefferson Parish as a defendant was permitted. On September 7, 1962, the State Bank Commissioner was allowed to intervene as a plaintiff. The District Court on September 26, 1962, granted the motion of National Association of Supervisors of State Banks for permission to appear as *amicus curiae*.

issuing a Certificate of Authority to the newly-organized Whitney-Jefferson bank, and that he be preliminarily and permanently enjoined

> "* * * from issuing to the Whitney National Bank, also known by the name of Crescent City National Bank, the Whitney Holding Corporation and/or the Whitney National Bank of Jefferson Parish, a Certificate or Certificates of Authority authorizing the establishment of new branch bank facilities by them or any of them in the name of Whitney National Bank or otherwise in Jefferson Parish, State of Louisiana * * *."

After the complaint was filed, the Comptroller at first voluntarily withheld issuance of a Certificate of Authority to Whitney-Jefferson, but later indicated he would do so no longer. As a consequence, the plaintiffs moved for a temporary restraining order which was issued by District Judge Hart June 27, 1962; and on July 10, 1962, District Judge Holtzoff entered a preliminary injunction in accordance with the prayer of the complaint.

Meanwhile the Louisiana legislature of 1962 adopted a State Bank Holding Company Act, being Act 275,[7] which the Governor designated as emergency legislation so that it became effective July 10, 1962. Section 3(5) of that Act (6:1003(5)) is in pertinent part as follows:

> "It shall be unlawful:
>
> * * * * * * *
>
> "(5) for any bank holding company or subsidiary thereof to open for business any bank not now opened for business, whether or not a charter, permit, license or certificate to open for business has already been issued * * *."

Admittedly, this measure was passed to prohibit the opening of Whitney-Jefferson.

Numerous pleadings, affidavits and other documents were filed by the various parties, including the opinion of the Board of Governors of the Federal Reserve System ap-

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[7] Now codified as 2 LSA-R.S. 6:1001-6:1006 (1962 Supp.).

proving Whitney Holding Corporation's acquisition of the Whitney National Bank of New Orleans, as reorganized, and Whitney National Bank in Jefferson Parish, and Governor Robertson's dissent from that action.

Cross motions for summary judgment, the Comptroller's motion to dismiss, and the plaintiffs' motion for a permanent injunction came on for hearing before District Judge McLaughlin on October 10, 1962. He filed a memorandum opinion holding that Louisiana Act 275 § 3(5) makes it unlawful for Whitney-Jefferson to commence business, and that the Comptroller should be enjoined from issuing to it a Certificate of Authority to open its doors. Having so concluded, Judge McLaughlin deemed it unnecessary to consider whether the establishment of Whitney-Jefferson violated 12 U.S.C. § 36(c). His opinion is reported in 211 F.Supp. 576 (1962).

Findings of fact and conclusions of law were filed by Judge McLaughlin December 5, 1962. The findings include the following:

> "4. Intervening defendant, Whitney National Bank in Jefferson Parish (Whitney-Jefferson), is a national banking association and a wholly owned subsidiary of Whitney Holding Corporation (Whitney Holding), a bank holding company incorporated under the laws of Louisiana.
>
> "5. Whitney National Bank of New Orleans (Whitney-New Orleans), not a party to this suit, is also a national banking association and a wholly owned subsidiary of Whitney Holding.
>
> "6. Whitney-New Orleans, created approximately 79 years ago, is the largest bank in Louisiana and one of the largest financial institutions in the southern portion of the United States, and presently conducts its business only in Orleans Parish (a political subdivision co-terminous with the City of New Orleans).
>
> "7. For a long period of years, Whitney-New Orleans has been desirous of expanding its banking operations into Jefferson Parish, Louisiana, a neighboring parish or county, but was prohibited by the operation of 12 U.S.C. § 36(c) and Louisiana Revised Statutes, Title 6, § 54, from establishing branch facilities outside of Orleans Parish. In an effort to ac-

complish its desired objective, Whitney-New Orleans decided to utilize the device of a bank holding company.

"8. The management of Whitney-New Orleans thereupon obtained from the Comptroller of the Currency informal approval of its desire to expand banking operations into Jefferson Parish through the formation of a bank holding company and set into motion the following proposed steps designed to accomplish such purpose:

"*First:* With $350,000. of its funds, Whitney-New Orleans created Whitney Holding, and distributed the 5,600 shares it received in Whitney Holding to its stockholders.

"*Second:* Whitney Holding invested the $350,000. provided by Whitney-New Orleans in a new national banking association, Crescent City National Bank, and received in return all of the shares of stock in Crescent City National Bank.

"*Third:* Whitney-New Orleans, Crescent City National Bank and Whitney Holding then entered into an agreement whereby Whitney-New Orleans was consolidated into Crescent City National Bank under the name Whitney-New Orleans, and Whitney Holding became the owner of all of the shares in the consolidated banks and the stockholders of the original Whitney-New Orleans received the remainder of the stock in Whitney Holding.

"*Fourth:* Whitney-New Orleans then provided $650,000. to Whitney Holding with which to purchase all of the stock in Whitney-Jefferson.

"9. On October 3, 1961, defendant Comptroller gave preliminary approval to the formation of the Crescent City National Bank and the Whitney National Bank in Jefferson Parish, Louisiana, subject to approval by the Federal Reserve Board of the application of Whitney Holding to become a bank holding company under the Bank Holding Company Act of 1956.

"10. On May 3, 1962, the Federal Reserve Board approved the application of Whitney Holding.

"11. Subsequently, defendant Comptroller then approved the consolidation of the existing Whitney-New

Orleans into the Crescent City National Bank under the original name of Whitney-New Orleans, and this was accomplished.

"12. Whitney Holding thereupon purchased all of the stock of Whitney-Jefferson for $650,000., by which time the Articles of Association and the Certificate of Organization of Whitney-Jefferson had been executed and filed with defendant Comptroller.

"13. On June 9, 1962, before defendant Comptroller could issue a Certificate of Authority authorizing Whitney-Jefferson to commence the business of banking in Jefferson Parish, Louisiana, this suit was instituted.

"14. Defendant Comptroller voluntarily withheld issuance of a Certificate of Authority until June 27, 1962, when a temporary restraining order was issued by this Court. After hearing, a preliminary injunction was ordered granted on July 6, 1962, and was signed and filed on July 10, 1962.

"15. On the same date, July 10, 1962, Louisiana Act 275 of 1962 became effective as the law of Louisiana.

Section 3(5) of said Act provides:

> "'It shall be unlawful • • • (5) for any bank holding company or subsidiary thereof to open for business any bank not now opened for business, whether or not a charter, permit, license or certificate to open for business has already been issued.'

• • • • • • •

"18. Plaintiffs and intervening plaintiffs have presented sworn, uncontroverted facts to show that, if defendant Comptroller is not prohibited from issuing his Certificate of Authority to Whitney-Jefferson, each plaintiff bank will sustain irreparable injury and damage in excess of $10,000., exclusive of interest and costs."

Among the court's conclusion of law are the following:

"2. Defendant Comptroller of the Currency has no discretion to issue a Certificate of Authority to a national banking association to commence a banking business in a manner prohibited by law (Commercial State

Bank v. Gidney, 174 F.Supp. 770, 778, affd. [108 U.S. App.D.C. 37,] 278 F.2d 871 (D.C.App.1960); Camden Trust Co. v. Gidney, [112 U.S.App.D.C. 197,] 301 F.2d 521 (D.C.App.), cert. denied, 369 U.S. 886, [82 S.Ct. 1158, 8 L.Ed.2d 287] (1962); Gidney v. Wayne Oakland Bank, 252 F.2d 537 (C.C.A.6), cert. denied, 358 U.S. 830 [79 S.Ct. 50, 3 L.Ed.2d 69] (1958)).

"3. The Federal Bank Holding Company Act, at 12 U.S.C. § 1846, reserved to the States such powers and jurisdiction as they had or might exercise in the future with respect to banks, bank holding companies and subsidiaries of bank holding companies and Section 3(5) of Louisiana Act 275 of 1962 was enacted pursuant to and within the scope of the said powers and jurisdiction so reserved to the States by Congress, and said statute is constitutional (Braeburn Securities Corp. v. Smith, [15 Ill.2d 55,] 153 N.E.2d 806, appeal dismissed for want of a substantial Federal question, 359 U.S. 311 [79 S.Ct. 876, 3 L.Ed.2d 831] (1959); Opinion of the Justices, [102 N.H. 106,] 151 A.2d 236 (N.H.1959); also 12 U.S.C. § 1842(d), Federal Bank Holding Company Act)).

"4. Act 275 of 1962 is directly applicable to intervening defendant, Whitney National Bank in Jefferson Parish, a wholly owned subsidiary of a Louisiana-incorporated bank holding company, and said statute makes it unlawful for said intervening defendant to commence the business of banking in Louisiana. Accordingly, defendant Comptroller of the Currency should be permanently enjoined and restrained from issuing a Certificate of Authority licensing Whitney Jefferson to commence such unlawful operations (Commercial State Bank v. Gidney, supra; Wayne Oakland Bank v. Gidney, supra).

"5. Plaintiff and intervening plaintiff banks, faced with proposed invasion of property rights and injury from the proposed unlawful issuance by defendant Comptroller of a Certificate of Authority to intervening defendant Whitney-Jefferson, have standing to bring this suit, and they have no other adequate remedy at law (Wisconsin Bankers Association v. Robertson, 190 F.Supp. 90, 94, affd. [111 U.S.App.D.C. 85] 294 F.2d 714 (App.D.C.), cert. denied 368 U.S. 938, [82

S.Ct. 381, 7 L.Ed.2d 338,] rehearing denied 368 U.S. 979, [82 S.Ct. 477, 7 L.Ed.2d 441] (1961); Commercial State Bank v. Gidney, supra; Wayne Oakland Bank v. Gidney, supra.)

* * * * * * *

"7. The cross motions for summary judgment of plaintiffs and intervening plaintiff should be and are granted; and the motions for summary judgment of the defendant and intervening defendant and the cross motion to dismiss by defendant Comptroller should be, and are, denied."

Judgment was entered in accordance with the conclusions. Whitney-Jefferson filed notice of appeal therefrom on January 31, 1963, and the Comptroller's notice of appeal was filed February 1, 1963. That explains why there are two separately styled and numbered proceedings in this court in what is in reality a single appeal.

In the brief for the Comptroller it is argued vigorously and at some length that the appellees have no standing to challenge his administrative determination to issue a Certificate of Authority to Whitney-Jefferson.[8] The only purpose of the state banks in filing this suit, says his brief, is to avoid the lessening of business and profits which might result from the presence of a new competing institution in the area; but, he continues, possible economic disadvantage from competition is not enough, absent a special Congressional grant of standing, to permit the disadvantaged party to invoke the jurisdiction of the courts.

[1] We were told by his counsel on oral argument, however, that the Comptroller had instructed him not to press the lack of standing argument, as he desired a ruling on the merits. If we could accept the Comptroller's offer to waive the point concerning standing, this opinion would be substantially shortened, as the discussion of the merits, when reached, will not detain us long. The point cannot be thus waived by the Comptroller because it is jurisdic-

[8] It is interesting to observe that the other appellant, Whitney-Jefferson, does not argue or even suggest that the state banks lack standing to sue.

tional: if the appellees lack standing to sue, their complaint should have been dismissed on that ground. Jurisdiction cannot be conferred by waiver; it is a threshold question which must be examined.

[2] The Comptroller's brief contends that "appellees can point to no legal or actionable wrong to them arising from the opening of a new national bank." If is, of course, true, as held in Alabama Power Co. v. Ickes, 302 U.S. 464, 58 S.Ct. 300, 82 L.Ed. 374 (1938), that one who has no contractual or statutory right to be free of competition, and no property right which would be infringed thereby, has no standing to challenge federal administrative action which simply increases the amount or effectiveness of competition. And we held in Union Nat. Bank of Clarksburg v. Home Loan Bank Bd., 98 U.S.App.D.C. 204, 233 F.2d 695 (1956), that, in the circumstances of that case, existing banks had no standing to challenge the Home Loan Bank Board's issuance of a charter to a proposed savings and loan association. In that case, the complaining banks were relying on a provision of the Home Owners' Loan Act that

> "No charter shall be granted • • unless in the judgment of the Board a necessity exists for such an institution in the community to be served • • • nor unless the same can be established without undue injury to properly conducted existing local thrift and home-financing institutions."

We held that the complaining banks were not "local thrift and home-financing institutions" and so were not protected by the statute from the competition of a lawfully established federal savings and loan association.

These and similar cases do not apply here because the applicable statutes and the facts of this case are different.[9] For instance, the appellees, Bank of New Orleans and Trust Company and Bank of Louisiana in New Orleans, are state banks having their principal and branch offices in Orleans

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[9] Our decision in Kansas City Power & Light Co. v. McKay, 96 U.S.App.D.C. 273, 225 F.2d 924, cert. denied, 350 U.S. 884, 76 S.Ct. 137, 100 L.Ed.2d 780 (1955), for example, involved federal competition sanctioned by Congress, while the competition here is private, and not so sanctioned.

Parish. They derive substantial volumes of business from the contiguous "east bank" portion of Jefferson Parish but are prohibited by Louisiana law from establishing branches there or in any parish other than Orleans.

They allege that Whitney, with its main office in Orleans Parish but also with substantial business from east Jefferson Parish, is subject to the same restriction as to the establishment of outside branches because 12 U.S.C. § 36(c) makes the Louisiana statute applicable to national banks. The state banks say that thus they have a right, under the combination of federal and state statutes, to be free of the competition in east Jefferson Parish which would result if Whitney or Orleans Parish is allowed to establish branches in east Jefferson where the state law forbids them to go. The state banks allege further that the Comptroller is not authorized to permit, but rather is prohibited by law from permitting, Whitney of New Orleans to establish branches in east Jefferson, and that his unlawful act in doing so would result in illegal competition and a consequent violation of their right, guaranteed by state and federal statutes, to be free of such competition.

The other appellee state bank is in nearby Lafayette Parish and has substantial business from east Jefferson which would be diminished by the unlawful competition of Whitney National's branches.

[3, 4] Clearly, then, under the allegations of their complaint, the three state banks have standing. It is not enough to say *contra* that the Whitney-Jefferson bank will not be a branch of Whitney New Orleans and that, therefore, the state banks have no legal right to protection against its establishment and consequently no standing to sue. For, whether or not Whitney-Jefferson will in legal effect be a branch of Whitney-New Orleans is the question tendered for adjudication, upon which under the circumstances the question of standing in part depends. If it is determined that Whitney-Jefferson is not a branch, it might or might not follow that the state banks had no standing—a matter on which we need not pass; but if it is held to be tantamount to a branch purporting to have been federally authorized, their standing would be indubitable.

[5] Nor is it an answer to say that the state banks may utilize the holding company device to enter east Jefferson

Parish, just as Whitney-New Orleans is attempting to do. Regardless of whether Act 275 of the 1962 Louisiana legislature is a direct prohibition against the opening of the new Whitney-Jefferson, unquestionably it effectively prevents the appellee state banks from opening new banks in Jefferson Parish through the medium of holding companies or otherwise. So, the complaint is that the Comptroller has permitted Whitney-New Orleans to organize a new branch in east Jefferson through the use of a holding company device which Louisiana law forbids a state bank to employ, and is about to authorize its opening.

The distinction between this case and those cited by the Comptroller as to standing to sue was carefully drawn by the Supreme Court in Alabama Power Co. v. Ickes, supra, 302 U.S. at page 484, 58 S.Ct. at page 306, 82 L.Ed. 374 (one of his citations), when it said:

> "Frost v. Corporation Commission, 278 U.S. 515, 49 S.Ct. 235, 73 L.Ed. 483, relied upon by petitioner, presents an altogether different situation. Appellant there owned a cotton-ginning business in the city of Durant, Oklahoma, for the operation of which he had a license from the corporation commission. The law of Oklahoma provided that no gin should be operated without a license from the commission, which could be obtained only upon specified conditions. We held that such a license was a franchise constituting a property right within the protection of the Fourteenth Amendment; and that while the acquisition of the franchise did not preclude the state from making similar valid grants to others, *it was exclusive against an attempt to operate a competing gin without a permit or under a void permit.* The Durant Co-operative Gin Company sought to obtain a permit from the commission which, for reasons stated in our opinion, we held would be void and a clear invasion of Frost's property rights. *We concluded that a legal right of Frost to be free from such competition would be invaded by one not having a valid franchise to compete,* and sustained Frost's right to an injunction against the commission and the Durant company. See Corporation Commission v. Lowe, 281 U.S. 431, 435, 50 S.Ct. 397, 74 L.Ed. 945. *The difference between the Frost case and this is fundamental; for the competition contemplated there was*

unlawful while that of the municipalities contemplated here is entirely lawful." (Emphasis supplied.)

Although the Frost case is not factually identical with this one, it is sufficiently similar to be dispositive of the question of standing. The charters of the appellee banks, granted by the State of Louisiana, are guarded by a combination of specifically applicable federal and state statutes. The appellee banks cannot complain of lawful competition from other lawfully chartered state or national banks because their own charters are not exclusive licenses. But where, as here, the threatened competition arises from an allegedly illegal facility, the appellee state banks have standing to invoke the jurisdiction of a federal court to challenge the alleged unlawful federal administrative action which admittedly would result in irreparable injury to their property rights in their charters.

[6] The Comptroller asserts he has discretion as to whether to issue a Certificate of Authority to a new national bank which cannot be judicially controlled. The same contention was made in Commercial State Bank of Roseville v. Gidney, 174 F.Supp. 770 (D.C.D.C.1959), where two state banks within two and one-half miles of a proposed national bank branch sought to enjoin the then Comptroller from authorizing the unlawful competition which threatened them with immediate and irreparable injury. Uncontroverted affidavits showed that the town of Clinton, site of the proposed branch, could not itself support the new facility, which would therefore necessarily draw its business from the surrounding communities already served by the complaining state banks. District Judge Youngdahl brushed aside the Comptroller's discretion argument by saying, at page 778:

> "Defendant argues that the approval or disapproval of branches of national banks is a matter clearly committed to the *discretion* of the Comptroller. But there is *no discretion* in the Comptroller to approve the establishment of a branch office at a location prohibited by law. * * * In the instant case, there is no desire to control the defendant's discretion * * *. But, as mentioned above, there is *no discretion* to unlawfully issue a certificate. * * *" (Emphasis added.)

We affirmed Judge Youngdahl's decision. 108 U.S.App.D.C. 37, 278 F.2d 871 (1960).

In the case of National Bank of Detroit v. Wayne Oakland Bank, 252 F.2d 537, at page 544, cert. denied 358 U.S. 830, 79 S.Ct. 50, 3 L.Ed.2d 69 (1958), the Sixth Circuit said:

> "• • • The district court found, as a fact, that the competition resulting from the opening and operation of a branch by the National Bank of Detroit would certainly cause inestimable damage to The Wayne Oakland Bank. Whether the rights of a party are infringed by unlawful action of an individual or by exertion of unauthorized federal administrative power, it is entitled to have such controversy adjudicated."

Judge Tamm of our District Court held in Wisconsin Bankers Association v. Robertson, 190 F.Supp. 90 (1960), that national and state banks of Wisconsin collectively have the exclusive right to conduct the business of banking in that state, which gave them standing to challenge alleged competition in that business by federal savings and loan associations.[10]

In sum, we have no doubt that the three state banks[11] had standing to sue the Comptroller in this action in order to test the legality of his proposed action. This conclusion makes it unnecessary to decide whether the Louisiana State Bank Commissioner had standing to sue.

We turn to the question on the merits: whether the District Court was correct in permanently restraining and enjoining the Comptroller from issuing a Certificate of Authority to Whitney Jefferson. If Whitney-Jefferson, in its organization, management and operation, would be to all intents and purposes a branch of Whitney-New Orleans forbidden by 12 U.S.C. § 36(c), the authority of the District Court to enjoin him from issuing a Certificate of Authority is quite clear.

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[10] We affirmed; no cross appeal was filed. 111 U.S.App.D.C. 85, 294 F.2d 714, cert. denied 368 U.S. 938, 82 S.Ct. 381, 7 L.Ed.2d 338 (1961), rehearing denied 368 U.S. 979, 82 S.Ct. 477, 7 L.Ed.2d 441 (1962).

[11] The District Court's finding of fact No. 18 showed their irreparable injury.

Since Whitney-Jefferson clearly is not an affiliate, the question is whether the elaborate and ingenious scheme of reorganization devised by Whitney-New Orleans results in what is in reality the establishment of a branch of Whitney-New Orleans in east Jefferson Parish, in violation of federal law.

[7] There was actually no pretense about the matter: Whitney of New Orleans frankly proposed to evade the statutes by establishing through the holding company arrangement an office in east Jefferson Parish which it would manage and control. Its president said on October 27, 1961, in his communication to Whitney-New Orleans stockholders which explained in detail the plan of reorganization:

> "The basic purpose of the program is to allow the Whitney organization in New Orleans to commence a Holding Company operation controlling a bank in East Jefferson Parish to protect Whitney's competitive position in that area into which many of Whitney's present customers have moved."

On October 28, 1961, he wrote to his stockholders:

> "* * * From the depositors [*sic*] point of view, those in the smaller bank will be assured of the *same management* which directs the larger one without possibility of interruption. They will be assured of access to the large loan limits of *the combined banks*. They will have the security which arises out of the fact that *the large and the small bank have identical ownership as well as management*.
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> "From the customer point of view there will be no conflict of interest arising out of the manner in which the customer sees fit to divide his business between the commonly owned banks in the two parishes. *He will have the full benefits of a relationship with the large bank* and its officers.
>
> "Because of *the permanent relationship* between the large and the smaller bank, the smaller one can operate safely with a smaller capitalization." (Emphasis supplied.)

This is a very good description of a branch banking operation, regardless of the fact that Whitney's president did not denominate it as such. The nature of the arrangement, and not the label applied to it, determines the character of the relationship between two banking institutions. In 12 U.S.C. § 36 Congress gave a broad meaning to the word "branch":

> "(f) The term 'branch' as used in this section shall be held to include *any branch bank, branch office, branch agency, additional office, or any branch place of business* located in any State • • • at which deposits are received, or checks paid, or money lent." (Emphasis supplied.)

The Board of Governors of the Federal Reserve System, although it approved the application of Whitney Holding Corporation to acquire the capital stock of Whitney-New Orleans and Whitney-Jefferson, was under no illusion as to the true nature of the transaction. It said:

> "Under the law of Louisiana, a bank may not establish branches outside of the parish in which its head office is situated. • • • •
>
> • • • • • • •
>
> "• • • *The stated purpose of the proposed holding company system is to enable an organization centered about Whitney-New Orleans to provide banking services not only through its existing 12 offices within the City of New Orleans but also through offices in the East Bank of Jefferson Parish.* The holding company system will be under the direction of the present executive management of Whitney New Orleans; *in fact, for present purposes the holding company itself is simply the means by which Whitney banking offices may be established and operated in East Bank.* Consequently, the character of the management and the prospects of the Applicant and its two proposed subsidiary banks may be evaluated largely on the basis of the financial history and condition, character of the management, and prospects of Whitney New Orleans.
>
> "The financial history of Whitney New Orleans

has been satisfactory. The condition of that bank is sound and its management is regarded as satisfactory. Accordingly, it is believed that the management of Applicant and Whitney Jefferson will be satisfactory and the prospects of the holding company, *which depend principally upon the prospects of Whitney New Orleans*, are favorable.

* * * * * * *

"* * * *The management and policies of the holding company system, it appears, would be equivalent to those of Whitney New Orleans:* * * *" (Emphasis supplied.)

The Board of Governors said, however, in denying the protestants' petition for reconsideration of its approval of Whitney Holding's application:

"* * * [T]hey [the arguments for reconsideration] relate largely to an alleged violation of provisions of the National Bank Act, which is administered by the Comptroller of the Currency * * *."[12]

Whitney-New Orleans's purpose of evading federal and state statutes forbidding branch banking in Louisiana beyond parish lines was known to the Comptroller when

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[12] This paragraph containing the excerpt last quoted above is as follows:

"The Board has considered the reasons advanced in the Petition for Reconsideration. To a considerable extent, these are based upon allegations that the Whitney Reorganization Program was not in conformity with applicable provisions of Federal statutes. It is also alleged that the Board's action 'will unnecessarily place into the hands of federally chartered banks a powerful and unfair competitive advantage over State banks * * *.' In the judgment of the Board, those arguments are without substantial merit. In addition, they relate largely to an alleged violation of provisions of the National Bank Act, which is administered by the Comptroller of the Currency, an official of the United States Treasury Department."

he approved the arrangement. His affidavit, which is in the record states:

> "• • • [T]he Whitney National wished to explore with the Comptroller whatever legal means were available for a like expansion into this growing area, which needs additional banking facilities. The formation of an affiliate bank was discussed and the formation of a holding company was also discussed. The Bank management felt that a holding company which would own 100% of the stock of both the old bank and the new bank would be preferable to the formation of an affiliate of which the controlling stock would be held by the same persons who control Whitney New Orleans, but which, in view of the wide stock distribution of Whitney New Orleans, would invariably have a minority of stockholders who did not own stock in both banks. The existence of the minority stock interest in each bank, which did not hold corresponding shares in the other, was considered by the Whitney management to be an undesirable situation because it could conceivably hamper the most efficient and effective day-to-day operation of the two banks. Since the same group would be managing both banks, it was thought that situations could arise in which it would be impossible for the interest of two different groups of minority stockholders to be fully protected. For this reason, the Whitney management, as was their right and prerogative elected to use a holding company for the purpose of establishing a new bank in Jefferson Parish.
>
> "At all times the applicable Louisiana statutes forbidding the establishment of branch offices across parish lines were fully considered and there was no suggestion that the formation of a holding company would be in any way clandestine or evasive. • • •"

The Comptroller states in his brief:

> "• • • [T]he Ninth Circuit has, in a case substantially on all fours with one at bar, recently rejected an attempt to hold the branch banking prohibition of 12 U.S.C. 36 applicable to an affiliate of a bank holding company. First Nat. Bank of Billings

v. First Bank Stock Corp., 306 F.2d 937 (C.A.9 [1962])

* * *"

The Billings case is far from being factually "on all fours" with the present case. There the bank holding company was organized in 1929, and had been operating in that capacity for 30 years. It possessed stock in 87 banks with 94 offices. Thus, it was not created or organized by a bank, as Whitney Holding was, solely for the purpose of opening a branch office of that bank. It was the traditionally recognized bank holding company which, with its own capital, invests in or buys the stock of banks. It was not the type of holding company here involved, whose only capital was the money siphoned through it by Whitney-New Orleans to open Whitney-Jefferson in a prohibited location.

[8] And the Billings opinion says, at page 942:

> "* * * What must appellants show, to establish that Valley is such a branch? They must show, that, in substance, Midland is doing business through the instrumentality of Valley, or vice versa, in the same way as if the institutions were one. (Cf. Camden Trust Co. v. Gidney, D.C. Cir., 1962, [112 U.S.App. D.C. 197] 301 F.2d 521) We do not agree with appellees that the fact that the two banks are separate corporate organizations demonstrates conclusively that one is not a branch of the other. In the banking field, as elsewhere, courts have power to 'pierce the corporate veil' when the realities require it."

We agree with the Ninth Circuit that the corporate veil should be pierced whenever one bank is "doing business through the instrumentality of" the other or "in the same way as if the institutions were one." "The unitary type of operation," said in the Billings opinion to be "characteristic of branch banking," is present here. In such circumstances, the relation of parent and branch exists, even though the banks are separate corporate organizations.

The facts already recited sufficiently show, we think, that Whitney-New Orleans intends to do business through Whitney-Jefferson in the same way as if the institutions

were one. The president of Whitney-New Orleans frankly made this quite clear. We recite some of his statements: On June 28, 1961, in submitting to the Comptroller applications to organize Crescent City and Whitney-Jefferson and to consolidate Crescent City with the original Whitney-New Orleans, Whitney's president said:

> "These application form part of an overall plan for the operation in the Parish of Orleans and in the Parish of Jefferson of the Whitney organization in holding company form."

On October 27, 1961, he advised his shareholders that

> "The basic purpose of the program is to allow the Whitney organization in New Orleans to commence a Holding Company operation controlling a bank in East Jefferson Parish to protect Whitney's competitive position in that area into which many of Whitney's present customers have moved."

Addressing them on October 28, 1962, he spoke of Whitney-New Orleans and Whitney-Jefferson as "the combined banks," said the large and small banks will "have identical ownership as well as management," and referred to the organization plan as a "method of pooling all of the deposits of our customers and of our capital funds * * *." And, as we have pointed out, the Board of Governors of the Federal Reserve System said "the holding company itself is simply the means by which Whitney banking offices may be established and operated in East Bank [east Jefferson Parish]."

[9] Consequently, we pierce the corporate veil which shrouds this intricate transaction, and see Whitney-New Orleans attempting to establish a branch in Jefferson Parish in violation of 12 U.S.C. § 36(c). It is a boot-strap operation by which Whitney-New Orleans, using its own funds in corporate maneuvering, seeks to establish a branch in prohibited territory. Like Jacob of old, Whitney New Orleans covered its hands with the Esau-like plan of reorganization and, despite the telltale sound of its own voice, obtained the blessing of the Comptroller of the Currency. Unlike Isaac, however, the Comptroller was not gulled by the ruse; acting *ultra vires* in the circumstances shown,

he knowingly permitted it because he considered the end desirable, and because he thought the corporate maneuvering impervious to attack. But, when the corporate veil is pierced, it becomes apparent that both voice and hands were those of Whitney-New Orleans.

The Comptroller contends that the reasoning and holding of our Camden Trust opinion [13] are controlling here. We do not agree. Whitney of New Orleans considered the "affiliate" arrangement we approved in the Camden case, and decided not to use it because it does not permit the identity of ownership provided by the holding company device, and because it does not assure that even the permitted affiliation will remain constant.

Quite unlike the sum total of the several factors which led us to approve the "affiliate" status in the Camden Trust situation, we need observe only that here, *inter alia*, the holding company is not providing Whitney-Jefferson with new and fresh capital, but with capital supplied by Whitney-New Orleans; the new bank will be managed and controlled by the executives of Whitney-New Orleans; and the name, Whitney National Bank in Jefferson Parish (the last three words in small letters on its checks and other forms), is easily susceptible of confusion with the parent organizer,[14] The Whitney National Bank of New Orleans.

We are unwilling to extend the holding of the Camden Trust case to cover a situation such as that presented here. We think it clear that the opening of Whitney-Jefferson

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[13] Supra, note 3.

[14] On June 28, 1961, the Whitney-New Orleans mailed to the then Comptroller of the Currency the following:

1. An application to organize the Crescent City National Bank.

2. An application to organize Whitney National Bank in Jefferson Parish.

3. An application for approval to consolidate the Crescent City National Bank with the present Whitney National Bank of New Orleans.

At that time, Whitney Holding Corporation had not been incorporated, so it was not the organizer of Whitney-Jefferson.

is prohibited by 12 U.S.C. § 36 and that, consequently, the Comptroller was properly enjoined from issuing a Certificate of Authority for it to begin business. It is therefore unnecessary for us to decide whether the opening is also prohibited by Act 275 of the Louisiana legislature.[15]

Affirmed.

[15] If so, the actual opening of Whitney-Jefferson would violate the state statute even if the Comptroller had already issued his Certificate of Authority, for Act 275 forbids the opening "whether or not, a charter, permit, license or certificate to open for business has already been issued."

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1962

Civil 1857—62

No. 17,672

WHITNEY NATIONAL BANK IN JEFFERSON PARISH, *Appellant*,

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL., *Appellees*.

Appeal from the United States District Court for the District of Columbia

Before: WILBUR K. MILLER, WASHINGTON and DANAHER, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed, and it is

FURTHER ORDERED by this Court that appellees recover from appellant their taxable costs on appeal, and have execution therefor.

Per Circuit Judge WILBUR K. MILLER.

Dated: Aug 14 1963

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

September Term, 1963

No. 17,672

WHITNEY NATIONAL BANK IN JEFFERSON PARISH, *Appellant*,

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, *et al.*, *Appellees*.

No. 17,681

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY, *Appellant*,

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, *et al.*, *Appellees*.

Before: BAZELON, Chief Judge, WILBUR K. MILLER, FAHY, WASHINGTON, DANAHER, BASTIAN, BURGER, WRIGHT, and McGOWAN, Circuit Judges, in Chambers.

ORDER

On consideration of the petition of appellant in case No. 17,672 for rehearing *en banc*, of the petition of appellant in case No. 17,681 for rehearing en banc, and of the answer thereto filed by appellee Banks, and on consideration of the motion of appellant in case No. 17,681 for leave to file a supplemental memorandum in support of the petition for rehearing *en banc*, and of the objection thereto filed by appellee Banks, and on consideration of the motion of appellee Banks for leave to file a supplemental appendix to their reply to appellant's petition for rehearing in case No. 17,681, it is

ORDERED by the court that: (1) Appellant's motion for leave to file a supplemental memorandum in support of the petition for rehearing *en banc* in case No. 17,681 is hereby denied; (2) The motion of appellee Banks for leave to file

supplemental appendix to their reply to appellant's petition for rehearing *en banc* in case No. 17,681 is hereby granted; and (3) Appellants' aforesaid petitions for rehearing *en banc* are hereby denied.

Per Curiam.

Dated: Oct 17 1963

Circuit Judges WRIGHT and MCGOWAN did not participate in the foregoing order.

(9827-7)

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement:	
1. The underlying facts	3
2. Administrative proceedings	5
3. Judicial proceedings in the Fifth Circuit	7
4. Judicial proceedings against the Comptroller	7
Reasons for granting the writ	10
1. Jurisdiction of the district court	11
2. The merits	17
Conclusion	23
Appendix A	24
Appendix B	27

CITATIONS

Cases:	
F.C.C. v. *Sanders Bros. Radio Station*, 309 U.S. 470	14
First National Bank in Billings v. *First Bank Stock Corp.*, 306 F. 2d 937	21, 22
Frost v. *Corporation Commission*, 278 U.S. 515	14
Gidney v. *Wayne Oakland Bank*, 252 F. 2d 537, certiorari denied, 358 U.S. 830	14
Tennessee Power Co. v. *T.V.A.*, 306 U.S. 118	14
Statutes:	
Banking Act of 1933 (Act of June 16, 1933, c. 89, 48 Stat. 189):	
Sec. 23, as amended, 12 U.S.C. 36(c)	3, 8, 10, 15, 20, 28
Sec. 19, 12 U.S.C. 61	20
Sec. 27, 12 U.S.C. 161	20
Sec. 13, 12 U.S.C. 371(c)	20
Sec. 20, 12 U.S.C. 377	20
Sec. 28, 12 U.S.C. 481	20

719-323—64—1

Statutes—Continued
Bank Holding Company Act of 1956 (Act of May 9, 1956, c. 240, 70 Stat. 133):
Page
Sec. 2, 12 U.S.C. 1841 ... 29
Sec. 3, 12 U.S.C. 1842 ... 6, 11, 30
Sec. 6, 12 U.S.C. 1845 ... 19, 32
Sec. 7, 12 U.S.C. 1846 ... 33
Sec. 9, 12 U.S.C. 1848 ... 17, 22, 33
Louisiana Act No. 275 of 1962 ... 7, 34
La. R.S. § 6:54 ... 3
National Bank Act (Act of February 25, 1863), 12 U.S.C. 21, *et seq.*:
R.S. § 5136, as amended, 12 U.S.C. 24 ... 27
R.S. § 5140, 12 U.S.C. 53 ... 19
R.S. § 5168, 12 U.S.C. 26 ... 27
R.S. § 5169, 12 U.S.C. 27 ... 8, 11, 28
R.S. § 5202 as amended, 12 U.S.C. 82 ... 19
R.S. § 5200 as amended, 12 U.S.C. 84 ... 19
R.S. § 5239 as amended, 12 U.S.C. 93 ... 20
28 U.S.C. (Supp. IV) 1391(e) ... 16
Miscellaneous:
76 Cong. Rec. 1998 ... 20
77 Cong. Rec. 5863, 5892 ... 20
102 Cong. Rec. 6753 ... 21
101 Cong. Rec. 8187 ... 21
102 Cong. Rec. 6750 ... 20
102 Cong. Rec. 6753–6754 ... 20, 21
Cartinhour, *Branch, Group and Chain Banking* (1931) ... 18
Chapman, *Concentration of Banking* (1934) ... 18
Chapman and Westerfield, *Branch Banking* (1942) ... 18
Comptroller of the Currency, *Annual Report, 1929* ... 18
Fischer, *Bank Holding Companies* (1961) ... 18
Fordham, *Branch Banks as Separate Entities*, 31 Col. L. Rev. 975 (1931) ... 18
Lamb, *Group Banking* (1961) ... 18
S. Rep. 1095, 84th Cong., 1st Sess. ... 21
Willit, *Selected Articles on Chain, Group and Branch Banking* (1930) ... 18

In the Supreme Court of the United States

OCTOBER TERM, 1963

NO.

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY,
PETITIONER

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of James L. Saxon, Comptroller of the Currency, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case. Judgment was entered on August 14, 1963, and became final on October 17, 1963.[1]

OPINIONS BELOW

The opinion of the court of appeals is reported at 323 F. 2d 290. The opinion of the district court is reported at 211 F. Supp. 576.

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[1] Whitney National Bank in Jefferson Parish has also filed a petition for a writ of certiorari from a judgment entered on the same date, arising out of the same transaction, now pending as No. 763.

JURISDICTION

The judgment of the court of appeals (App. A, *infra*, p. 24) was entered on August 14, 1963. Timely petitions for rehearing *en banc* were denied on October 17, 1963 (*id.*, pp. 25–26). By an order dated January 9, 1964, the Chief Justice extended the time for filing this petition to and including January 30, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a decision of the Federal Reserve Board, which approved a plan for the acquisition and operation of a new national bank by a bank holding company, pursuant to the Bank Holding Company Act of 1956, may later be attacked by competitor banks in a separate suit to enjoin the Comptroller of the Currency from authorizing the opening of the new national bank.

2. Whether the opening and operation of a separately chartered national bank by a bank holding company may be enjoined on the ground that the bank is an unlawful branch of another bank.[2]

STATUTES INVOLVED

The pertinent provisions of the statutes involved are set forth in Appendix B, *infra*, pp. 27–34.

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[2] If respondents seek to defend the judgment of the court of appeals on grounds not reached by that court, a third question may be presented: whether a state prohibition on the opening of national banks owned by bank holding companies is in conflict with the provisions of the National Bank Act.

STATEMENT

1: *The Underlying Facts.* The Whitney National Bank of New Orleans (hereafter "Whitney-New Orleans") is a national bank[3] with its main office and numerous branches in the City of New Orleans,[4] which is coextensive with the Parish of New Orleans.[4] It is the largest bank in Louisiana. With the expansion of the New Orleans metropolitan area beyond the city limits, the portion of Jefferson Parish adjoining New Orleans on the east bank of the Mississippi River ("East Jefferson Parish") has had a rapid industrial and residential expansion. Prospects for continued growth are excellent, and the need for further banking services is evident (Op. 38; J.A. 67, 70, 100–101, 426).[5]

Many of the residents of East Jefferson Parish have been customers of Whitney-New Orleans and other banks in the city. However, state law (La. R.S. § 6:54) prohibits banks from opening branch offices in parishes other than their home parish and these geographical limitations are made applicable to national banks by the Banking Act of 1933 (12 U.S.C. 36). The downtown New Orleans banks have been unable, therefore, to follow their customers to East Jefferson Parish by establishing branches there.

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[3] A national bank is a national banking association organized and operated pursuant to the National Bank Act, 12 U.S.C. 21, *et seq.*

[4] A parish in Louisiana is comparable to a county in other States.

[5] "Op.—" references are to the opinion of the court of appeals printed as an appendix to the petition of Whitney National Bank in Jefferson Parish, No. 763, this Term. "J.A.—" references are to the Joint Appendix printed and filed in the court of appeals.

In 1955, the majority stockholders of the National Bank of Commerce in New Orleans, Whitney-New Orleans' largest competitor, opened a separately chartered affiliate bank in East Jefferson Parish, the National Bank of Commerce in Jefferson Parish. The two banks were controlled by the same stockholders, with an interlocking set of directors and executive officers (J.A. 65, 116). Another of Whitney-New Orleans' principal competitors also established a separately chartered affiliate there (J.A. 42, 90, 116).

Faced with this competition and the statutory prohibition of branch offices in other parishes, the management of Whitney-New Orleans considered the two possibilities for opening related banking facilities in Jefferson Parish: (1) the establishment of an affiliate, similar to those of its competitors; (2) the establishment of a bank-holding company, which would in turn establish a separately chartered bank in Jefferson Parish (J.A. 65). In order to assure a continuity of relationship between the new and old banks, and to avoid any conflict of interest in transactions with the new bank, the Whitney management decided to adopt the holding company approach (Op. 39–41; J.A. 69–70, 71–72).

A five-step program was developed. In brief,[6] the program involved the organization and establishment of a holding company (Whitney Holding Corpora-

[6] The steps of the program are set forth at Op. 41, and are fully detailed in a letter to Whitney stockholders (J.A. 112–115).

tion), the placing of the ownership of Whitney-New Orleans in the holding company (through a merger with Crescent City National Bank, which was to be created for that purpose) and the placing of the ownership of the holding company in the hands of the original owners of the bank. Finally, with the proceeds of a dividend from Whitney-New Orleans' undivided profits, the holding company was to purchase the stock (except for directors' qualifying shares) of a newly chartered bank in Jefferson Parish (Op. 41). After due notice shareholders representing over 88 percent of the stock of Whitney-New Orleans approved the plan. The program also required the approval of the Comptroller of the Currency under the National Bank Act for the chartering and opening of the new bank,[7] and the approval of the Board of Governors of the Federal Reserve System (hereafter, the "Federal Reserve Board") under the Bank Holding Company Act of 1956 for permission for the holding company to acquire and operate the new bank in Jefferson Parish.

2. *Administrative Proceedings.* On June 28, 1961, Whitney submitted its entire program to the Comptroller of the Currency. In accordance with usual practice, his examiners carried out a full field investigation over a period of several months and, as was customary, communicated with competitor banks to obtain their views. By letter of October 3, 1961, the

[7] His approval was also required for the chartering of Crescent City National Bank and its consolidation with Whitney-New Orleans, which are steps in the program.

Comptroller gave his preliminary approval to the program, subject to the Federal Reserve Board's approval, under the Bank Holding Company Act, of the acquisition by Whitney Holding Corporation of the stock of Whitney-New Orleans and of the new bank in Jefferson Parish (J.A. 46–47).

On July 14, 1961, Whitney Holding Corporation filed an application with the Federal Reserve Board for permission to become a registered bank holding company, under the Bank Holding Company Act of 1956, by acquiring substantially all the stock of Whitney-New Orleans and of the new bank, which was to be called Whitney National Bank in Jefferson Parish (hereafter, "Whitney-Jefferson") (J.A. 58). Pursuant to the provisions of Section 3(b) of the Bank Holding Company Act (12 U.S.C. 1842(b), *infra* p. 31), the Board requested the Comptroller's advice as to whether or not it should approve the Whitney application. The Comptroller recommended the Board's approval of the application, by letter of October 11, 1961 (J.A. 44, 166–167). Thereafter, the Federal Reserve Board ordered that a public proceeding be held before it on January 17, 1962, and gave public notice of the hearing.

At the hearing before the seven Governors of the Board, testimony and argument were submitted on behalf of the application by Whitney's president and attorney. Testimony and argument in opposition were also submitted, but none of the present respondents appeared at the hearing or made their views known to the Board prior to its decision (J.A. 61–95). By

order and opinion dated May 3, 1962, the Board approved the Whitney application by a vote of 6 to 1 (J.S. 97–98, 99–111), but provided that the acquisitions should not be consummated sooner than seven days after that date. No petition for rehearing or reconsideration was filed within that time. However, on June 13, 1962, two of the present respondents filed with the Federal Reserve Board a petition for reconsideration of its decision approving the Whitney application. On June 25, 1962, the Board denied the petition as untimely and as having no substantial merit (J.A. 167–169).

3. *Judicial Proceedings In the Fifth Circuit.* These two respondents then petitioned the United States Court of Appeals for the Fifth Circuit for judicial review of the Board's decision under section 9 of the Bank Holding Company Act, contending that Whitney-Jefferson would be merely a branch of Whitney-New Orleans. The Fifth Circuit has not as yet taken any action on this petition.

4. *Judicial Proceedings Against the Comptroller.* By May 25, 1962, Whitney-Jefferson had been organized and recognized by the Comptroller as a national bank under the terms of the National Bank Act. The original stockholders of Whitney-New Orleans then owned Whitney Holding Corporation, which in turn had acquired the stock (except for directors' qualifying shares) of Whitney-New Orleans and Whitney-Jefferson. All that remained to be done to consummate the Whitney proposal was for the Comptroller to issue a certificate of authority, under the National

Bank Act (12 U.S.C. 27), to permit Whitney-Jefferson to commence the business of banking (J.A. 115–116).

On June 9, 1962, three State-chartered banks brought this action to restrain the Comptroller from issuing the certificate of authority which would permit Whitney-Jefferson to open for business. Standing was bottomed upon the injury that competition from Whitney-Jefferson might cause them (J.A. 16–17).[8] The gravamen of the complaint was that Whitney-Jefferson was a branch bank within the meaning and scope of the Banking Act of 1933 (12 U.S.C. 36, *infra*, pp. 28–29), and that its establishment was therefore prohibited by law (J.A. 6–20). An additional contention was advanced later. This was based on the fact that, while the complaint was pending in the district court, the Louisiana legislature enacted Louisiana Act No. 275 of 1962, which made it unlawful thereafter for any bank owned or controlled by a bank holding company to open for business whether or not it had received its charter or certificate to engage in the banking business (*infra*, p. 34). The bill was signed by the Governor on July 10, 1962, as "emergency legislation," to become effective immediately (Op. 43).

The case was submitted to the district court on cross-motions for summary judgment which relied up-

[8] Respondent banks are State-chartered competitors or potential competitors of the Whitney banks, none of which have their offices in Jefferson Parish. One of the three original plaintiffs, which was located in Jefferson Parish, voluntarily withdrew as a party plaintiff. Respondents Bank of Louisana in New Orleans and the State Bank Commissioner later intervened as parties plaintiff (see Op. 41–42, n. 6). Whitney-Jefferson intervened as a party defendant.

on the administrative record and opinions of the Federal Reserve Board, affidavits, and other documents. The district court granted plaintiff's motion for summary judgment and denied defendants' (J.A. 437). In a short memorandum opinion the court ruled the plaintiffs had standing to invoke its jurisdiction; that the Bank Holding Company Act of 1956 reserved to or conferred upon the States authority to prohibit the operation within their borders of banks owned by holding companies, including national banks; and that Louisiana Act No. 275 of 1962 deprived the Comptroller of the Currency of his authority under the National Bank Act to issue a certificate of authority to the Whitney National Bank in Jefferson Parish (211 F. Supp. 576). The court found it unnecessary to rule specifically upon the theory that Whitney–Jefferson was merely a branch of Whitney–New Orleans (J.A. 438).

Both the Comptroller and Whitney-Jefferson appealed. In addition to his arguments on the merits, the Comptroller again urged that the district court lacked jurisdiction because competitor banks do not have standing to challenge the opening of a new national bank and that such banks have an adequate administrative remedy before the Federal Reserve Board with a right to judicial review of the Board's decision. Both appellants called the court's attention to the review proceedings which were then pending in the Fifth Circuit, and the Comptroller argued that respondents had not exhausted their remedies under the Bank Holding Company Act.

The court of appeals held that the district court had jurisdiction. It ruled that bank charters are the equivalent of semi-exclusive franchises and confer upon their holders a right to be free from the competition of a branch whose operation violates the branch-banking provisions of the Banking Act of 1933, 12 U.S.C. 36. On the merits the court held that Whitney–Jefferson was a branch of Whitney-New Orleans and that the operation of branches, outside of New Orleans Parish, was forbidden by the Banking Act of 1933, 12 U.S.C. 36. It, therefore, found it unnecessary to rule upon the applicability of Louisiana Act 275 of 1962 to national banks.

The Comptroller and Whitney-Jefferson filed timely petitions for rehearing *en banc*. The Comptroller again contended that the district court lacked jurisdiction over the controversy. To his previous arguments he added the contention that the decision of the court of appeals, which was based upon a ground which could and should have been presented to the Board, constituted an impermissible collateral attack upon the Board's decision. The petitions for rehearing were denied without opinion on October 17, 1963.

REASONS FOR GRANTING THE WRIT

The court below has held that competitor banks can litigate, in a district court suit to enjoin the Comptroller of the Currency from authorizing the opening of a new national bank, objections that should have been made the subject of an administrative determination by the Federal Reserve Board, subject to statu-

tory review in the appropriate court of appeals. It has further held that a separately chartered subsidiary of a bank-holding company is subject to the restrictions, imposed by the Banking Act of 1933, upon the location of branch offices of a single bank. These holdings, we believe, are both erroneous and of substantial and continuing importance to the banking industry and to the federal agencies charged with regulating that industry.

1. *Jurisdiction of the district court.* The Bank Holding Company Act requires the approval of the Federal Reserve Board if a bank holding company is to acquire a new subsidiary. 12 U.S.C. 1842, *infra*, pp. 30–32. The Act provides for a full administrative proceeding at which competitor banks may express their objections and the views of the Comptroller of the Currency are obtained, and for judicial review of the Board's decision by a court of appeals which must accept the Board's findings of fact if they are supported by substantial evidence. The permission of the Comptroller of the Currency is necessary under the National Bank Act in order to open a new national bank. 12 U.S.C. 27, *infra*, p. 28. The latter statute does not provide for an administrative hearing or judicial review, and the Comptroller's decisions are made informally, without an administrative record. When a bank holding company intends to acquire a subsidiary which is to be opened as a new national bank, the transaction has two aspects and requires the approval both of the Federal Reserve Board (for the acquisition) and of the Comptroller of the Currency (for the opening).

The jurisdictional question presented by this case is whether competitor banks must raise, in the established administrative proceedings before the Federal Reserve Board, all objections to the transaction upon which the Board is authorized to pass or may attack the transaction, after the Comptroller has recommended its approval and the Board has approved it, by a suit for an injunction brought against the Comptroller of the Currency. It is our contention that persons opposing the acquisition and operation of the new subsidiary must present to the Federal Reserve Board objections which can be raised before that agency, and that they are bound by its decision subject only to review in the reviewing court of appeals.

A. The Bank Holding Company Act of 1956 provides an administrative tribunal where competitor banks may raise their objections to the effects of the combination of banking resources and operations which results from the acquisition and operation of either a new or an existing bank by a bank-holding company. Consistent with general principles of primary jurisdiction and exhaustion of legal remedies, the Act manifests a purpose of making these statutory proceedings before the Federal Reserve Board, rather than a district court suit for an injunction, the proper and exclusive forum for all such objections. This result follows automatically in the case of the most common type of expansion of a bank-holding-company system—when a holding company acquires an operating national or state-chartered bank. In this event, the acquired bank already possesses all the certificates

necessary for operation, and there is thus no occasion on which the Comptroller of the Currency (or his state counterpart) can be enjoined by a district court from allowing the bank-holding company's subsidiary to open and conduct its business.

The same result is intended when a bank-holding company acquires a newly organized subsidiary. The Bank Holding Company Act makes the Comptroller of the Currency (or the equivalent state supervisory authority) a necessary participant in the administrative proceedings before the Federal Reserve Board, so that at this stage the views of each of these regulatory agencies can be considered together and resolved in the light of the evidence and arguments presented by all interested parties. Where, in a case such as this, the Federal Reserve Board has reached a determination consistent with the recommendation of the only other regulatory agency, the Comptroller of the Currency, after giving all interested parties full notice and an opportunity for hearing, that determination is meant to be final and not subject to later attacks by a suit for an injunction in a district court against the Comptroller.

This conclusion is confirmed by contrasting the statutory scheme of administrative proceeding and judicial review established for decisions of the Federal Reserve Board with the lack of any such provisions for decisions of the Comptroller. There is no statutory provision for an administrative hearing by the Comptroller of the Currency. His decisions are made informally and *ex parte*, unlike decisions of the Fed-

eral Reserve Board, which are to be made upon a record and with the participation of all interested parties, including competitor banks.[9] The federal statutes further define the forum and venue for judicial review of the decisions of the Board. There is, in contrast, no statutory provision for judicial review of decisions of the Comptroller of the Currency. Indeed, there is grave doubt as to whether the potential effect of increased competition upon another bank gives the latter standing to seek an injunction against the Comptroller. Thus, prior to this case, the courts have never entertained suits by competitor banks to enjoin the issuance by the Comptroller of a certificate to commence business as a new national bank[10] under the National Bank Act. Even if bank charters were to be equated with the franchises of public utilities, competitor banks would not appear to have sufficient legal interest, absent statutory authorization, to invoke the jurisdiction of a federal court to challenge administrative action which simply increases the degree of competition. *Tennessee Power Company* v. *T.V.A.*, 306 U.S. 118, 137, 144; see *F.C.C.* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 476–477.

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[9] Another circuit has held, improperly we think, that banks have standing to challenge the establishment of new branches. *Gidney* v. *Wayne Oakland Bank*, 252 F. 2d 537 (C.A. 6), certiorari denied, 358 U.S. 830.

[10] The court of appeals believed this Court's decision in *Frost* v. *Corporation Commission*, 278 U.S. 515, "to be dispositive of the question of standing" (Op. p. 52). In *Tennessee Power Co.* v. *T.V.A.*, *supra*, this Court found *Frost* to be "inapplicable" to situations not involving discrimination forbidden by the Fourteenth Amendment. 306 U.S. at 143.

B. It follows that the integrated scheme of federal banking regulation requires that all issues which can be raised and determined as part of the established administrative proceedings before the Federal Reserve Board should be raised before that Board. Despite what may have been some suggestion of doubt by the Board itself (Op. 56, n. 12),[11] we believe it clear that the issue decided by the court below should have been litigated before the Federal Reserve Board in the first instance, rather than before a district court. By the same token, it was subject to review by the Court of Appeals for the Fifth Circuit rather than by the Court of Appeals for the District of Columbia Circuit. If a separately chartered bank which is to be owned by a bank-holding company could be subjected to the territorial limitations imposed upon branch offices of a single bank (we believe that Congress intended that the two kinds of banking should never be treated as one, see *infra*, pp. 17–23), the determination as to whether a particular bank should be so treated would depend upon the relationship between that bank, the holding company, and the holding company's other subsidiaries, considered in the light of the policy considerations embodied in the Bank Hold-

[11] In denying respondents' request for reconsideration on the dual grounds that it was both untimely and without merit, the Board alluded to the fact that the statute making the geographical limitations of state law applicable to branch banks (12 U.S.C. 36) is administered by the Comptroller. The Board may have been referring to the fact that the Comptroller had already approved the lawfulness of the proposed transaction in his recommendations to the Board. See *supra*, p. 6.

ing Company Act. It is far more appropriate that this determination be made after full administrative proceedings by the agency charged with regulating bank-holding companies, the Federal Reserve Board, than that it be made by a district court in a suit against the Comptroller. The suit against the Comptroller in the present case is, in short, an impermissible collateral attack upon the Board's decision by persons who have not pursued to their conclusion the remedies specified by Congress.

C. Finally, the ruling of the court of appeals will have consequences of continuing importance. Since venue for a suit against an officer of the United States such as the Comptroller of the Currency lies in the District of Columbia (28 U.S.C. (Supp. IV) 1391 (e)), the decision below will subject a proposed acquisition of a new national bank by a bank holding company to attack in at least two forums, with different records created in each and with different standards for judicial review. The consequent waste of judicial effort and disruption of orderly processes is a matter of significant concern both to private parties and to the federal regulatory agencies.

The undesirability of multiple forms of administrative and judicial review of the same banking transaction is obvious. If competitor banks may raise the same challenge to a holding company's acquisition and operation of a new subsidiary before both the Federal Reserve Board and a district court (in a suit against the Comptroller of the Currency), the governmental and private parties will be called upon to incur the

unwarranted expense and burden of repetitious litigation. Beyond this, there is the likelihood of unseemly conflicts among the federal courts and administrative agencies engaged in reviewing the transaction. Thus, Section 9 of the Bank Holding Company Act provides for review of the Board's decision in a court of appeals where the Board's findings must be accepted if supported by substantial evidence. 12 U.S.C. 1848. Inconsistent findings might be made by the district court in a suit to enjoin the Comptroller of the Currency, for the court would presumably find the facts in a trial *de novo,* being bound neither by the findings of the Board (whose decision the district court is not reviewing) nor by the findings of the Comptroller, who has not yet finally acted when the suit for an injunction is brought, and who, in any event, decides informally and without an administrative record. The possibility of a conflict on questions of law between one court of appeals reviewing the decision of the Federal Reserve Board and another reviewing the decision of the district court is no less real.

2. *The merits.* The holding of the court below that separately chartered national banks which are subsidiaries of a bank-holding company are subject to the territorial restrictions imposed on branch offices by the Banking Act of 1933 (*infra,* pp. 28–29) is also erroneous and of substantial continuing importance to the banking industry. There are similarities between the operation of one bank with several branches and the operation of several separately chartered banks owned or controlled by a bank-holding company. Each form

of operation permits common ownership and control of multiple banking offices.[12] Indeed, the organization and operation of bank-holding companies is often motivated by a desire to avoid some of the restrictions against branch banking.[13] But there are also very substantial differences between the two forms of operation, arising in large part from the separate schemes of federal regulation. Because of these differences, Congress plainly decided in 1933, and again in 1956, that bank-holding companies and their separately chartered subsidiaries should not be subject to the territorial restrictions imposed on the branches of a single national bank. The court of appeals erred in disregarding that fundamental Congressional decision.

A. Even if Congress had not twice rejected the imposition of branch-banking restrictions on separately chartered national banks which are subsidiaries of a bank-holding company, the great difference in the two methods of operations would counsel against application to such subsidiaries of restrictions intended only for branches of a single bank. The National Bank

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[12] For studies on branch banking, and multiple-unit banking through separately chartered banks, their differences and similarities, see, *e.g.*, Cartinhour, *Branch, Group and Chain Banking* (1931); Chapman, *Concentration of Banking* (1934); Fordham, *Branch Banks as Separate Entities*, 31 Col. L. Rev. 975 (1931); Willit, *Selected Articles on Chain, Group and Branch Banking* (1930); Chapman and Westerfield, *Branch Banking* (1942); Lamb, *Group Banking* (1961).

[13] See Fischer, *Bank Holding Companies* (1961), pp. 1, 23, 138; Comptroller of the Currency, *Annual Report*, 1929, pp. 4–5.

Act [14] requires that national banks, regardless of ownership, have capital structures which are totally separate from and independent of those of other banks (see 12 U.S.C. 53), and which are subject to change only with the approval of the Comptroller. In contrast, all of the branches of a bank have but one capital structure. Each separately chartered bank affiliated with a holding company has its own deposits which are its sole liability, and from which it can make loans only to its own customers; whereas all the deposits of the branches of a single bank are pooled, and are available for investment or loan at the main office or at any other branch. The lending and borrowing limitations which the National Bank Act imposes upon separately chartered banks (12 U.S.C. 84, 82) are not applicable to branches of a single bank: the lending and borrowing limitations of each branch are the same as the total for all of the combined offices. While the assets of a branch may be freely transferred to the main office or to any other branch, the assets of a separately chartered bank may not be depleted or transferred to another bank owned by the same holding company.[15] In addition, the National Bank Act imposes substantial requirements upon separately chartered banks in regard to corporate organization, composition of boards of directors, man-

[14] Most State banking laws impose similar requirements on State-chartered banks.

[15] The Bank Holding Company Act prevents the mingling or pooling of assets of banks owned by a holding company with those of the holding company or its other subsidiaries. Sec. 6, 12 U.S.C. 1845.

agement, and termination of operations which are wholly absent in branch banking. 12 U.S.C. 71, 72, 93 (102 Cong. Rec. 6753–6754).

B. In the Banking Act of 1933, Congress chose to restrict branch banking for national banks to the geographic limits imposed upon state-chartered banks by state law. Section 23, 12 U.S.C. 36(c). In the very same Act, Congress imposed various obligations upon bank-holding companies; but it did not make the branch banking limitations applicable to them or to affiliated banks owned or controlled by them.[16] The Act adopted separate and mutually exclusive definitions of "branch" and "holding company affiliate," and the provisions applicable to one were inapplicable to the other. This Congressional decision to use differing regulatory schemes was made deliberately, because Congress thought the two kinds of banking "entirely different."[17]

Congress adopted the Bank Holding Company Act of 1956 as a comprehensive program for the regulation of bank-holding companies and the banks they owned. The premise of the legislation was that bank-holding companies are legitimate businesses which frequently provide valuable and beneficial service to the public, and should be subject only to that regulation necessary to prevent unfair competition and un-

[16] Sec. 13, 19, 20, 27 and 28, 12 U.S.C. 371c, 61, 377, 161, 481.

[17] 76 Cong. Rec. 1998. The statement was made by Senator Glass, the chief author and sponsor of the Act. 102 Cong. Rec. 6750; 77 Cong. Rec. 5863, 5892.

due concentration of banking activities.[18] Congress expressly rejected an effort to impose upon banks owned or controlled by bank-holding companies the geographic limitations against branch banking contained in the Banking Act of 1933. Although the House had passed a bill incorporating such a feature,[19] the Senate rejected that proposal on the ground that "A bank branch is, by form, ownership, and functions, vastly different from a bank-holding company affiliate."[20] The Senate view prevailed and was embodied in the Bank Holding Company Act of 1956.

Thus Congress deliberately decided to subject separately chartered banks owned or controlled by bank-holding companies to a wholly different regulatory scheme from that imposed upon branches of a single bank. There is accordingly no warrant for the holding of the court of appeals in this case that such banks are subject to the territorial restrictions imposed upon branches of a single bank. Indeed, we know of no prior instance in which a separately chartered bank has been treated as a branch by any court or regulatory agency.[21]

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[18] 102 Cong. Rec. 6750. Accord: Sen. Rep. 1095, 84th Cong., 1st Sess.

[19] 101 Cong. Rec. 8187.

[20] 102 Cong. Rec. 6753; see, also, Sen. Rept. 1095, 84th Cong., 1st Sess., p. 11, and 102 Cong. Rec. 6753–6754.

[21] In *First National Bank in Billings* v. *First Bank Stock Corp.*, 306 F. 2d 937 (C.A. 9)—a case which we believe is on its facts, irreconcilable with the decision below—the Ninth Circuit indicated in dictum that there might be circumstances in which a subsidiary of a bank holding company would be

C. The holding that a separately chartered and incorporated bank may be treated as a branch will have a broad and continuing impact upon the regulation of the banking industry and, perforce, the industry itself. Because proceedings for direct review of all Federal Reserve Board decisions under the Bank Holding Company Act (like suits brought against the Comptroller) may be brought in the District of Columbia Circuit,[22] the decision on the merits has nationwide application. It is clearly applicable to any instance in which an existing bank wishes to expand its operations by establishing a new holding company which is in turn to acquire a new or existing bank in any of the 34 States which limit branch banking. Beyond this, the rationale of the decision casts doubt upon any further growth of existing bank-holding companies, either through creation of new subsidiaries or through the purchase of existing banks, unless the requirements imposed upon branch banking are satisfied by the new subsidiary. The necessary result will be to encourage expansion through the use of affiliate banks, which are largely unregulated, rather than

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treated as a branch. 306 F. 2d at 943. However, the formation and acquisition of the new bank in that case took place prior to the effective date of the Bank Holding Company Act of 1956, the regulatory provisions of which made plain the contrary intent of Congress. See *supra*, pp. 20–21.

[22] Section 9 of the Act, 12 U.S.C. 1848, permits any party aggrieved by a Board order to institute proceedings for review of the order either in the circuit in which the party has its principal place of business or in the District of Columbia Circuit.

under the system of regulation established by the Bank Holding Company Act of 1956. The broad implications of the decision, made in apparent disregard of the Congressional scheme, make it important that the issue be definitively resolved by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Attorneys.

JANUARY 1964.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1962

No. 17681

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY, APPELLANT

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL., APPELLEES

Appeal from the United States District Court for the District of Columbia

Before: WILBUR K. MILLER, WASHINGTON and DANAHER, Circuit Judges.

Judgment

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed, and it is

FURTHER ORDERED by this Court that appellees recover from appellant their taxable costs on appeal, and have execution therefor.

Per Circuit Judge WILBUR K. MILLER.

Dated: AUGUST 14 1963.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1963

No. 17,672

WHITNEY NATIONAL BANK IN JEFFERSON PARISH, APPELLANT

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL., APPELLEES

No. 17,681

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY, APPELLANT

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL., APPELLEES

Before: BAZELON, Chief Judge, WILBUR K. MILLER, FAHY, WASHINGTON, DANAHER, BASTIAN, BURGER, WRIGHT, and McGOWAN, Circuit Judges, in Chambers.

Order

On consideration of the petition of appellant in case No. 17,672 for rehearing *en banc*, of the petition of appellant in case No. 17,681 for rehearing en banc, and of the answer thereto filed by appellee Banks, and on consideration of the motion of appellant in case No. 17,681 for leave to file a supplemental memorandum in support of the petition for rehearing *en banc*, and of the objection thereto filed by appellee Banks, and on consideration of the motion of appellee Banks for leave to file a supplemental appendix to

their reply to appellant's petition for rehearing in case No. 17,681, it is

ORDERED by the court that: (1) Appellant's motion for leave to file a supplemental memorandum in support of the petition for rehearing *en banc* in case No. 17,681 is hereby denied; (2) The motion of appellee Banks for leave to file supplemental appendix to their reply to appellant's petition for rehearing *en banc* in case No. 17,681 is hereby granted; and (3) Appellants' aforesaid petitions for rehearing *en banc* are hereby denied.

Per Curiam.

Dated: OCT 17 1963.

Circuit Judges WRIGHT and MCGOWAN did not participate in the foregoing order.

APPENDIX B

1. The National Bank Act provides in pertinent part:

R.S. § 5136, as amended, 12 U.S.C. 24:

Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate * * *

* * * * *

R.S. § 5168, 12 U.S.C. 26:

Whenever a certificate is transmitted to the Comptroller of the Currency, as provided in this Title, and the association transmitting the same notifies the Comptroller that at least fifty per centum of its capital stock has been duly paid in, and that such association has complied with all the provisions of this Title required to be complied with before an association shall be authorized to commence the business of banking, the Comptroller shall examine into the condition of such association, ascertain especially the amount of money paid in on account of its capital, the name and place of residence of each of its directors, and the amount of the capital stock of which each is the owner in good faith, and generally whether such association has complied with all the provisions of this Title required to entitle it to engage in the business of banking; and shall cause to be made and attested by the oaths of a majority of the directors, and by the president or cashier of the association, a statement of all the facts necessary to enable the Comptroller to determine whether the association is lawfully entitled to commence the business of banking.

R.S. § 5169, 12 U.S.C. 27:

If, upon a careful examination of the facts so reported, and of any other facts which may come to the knowledge of the Comptroller, whether by means of a special commission appointed by him for the purpose of inquiring into the condition of such association, or otherwise, it appears that such association is lawfully entitled to commence the business of banking, the Comptroller shall give to such association a certificate, under his hand and official seal, that such association has complied with all the provisions required to be complied with before commencing the business of banking, and that such association is authorized to commence such business. But the Comptroller may withhold from an association his certificate authorizing the commencement of business, whenever he has reason to suppose that the shareholders have formed the same for any other than the legitimate objects contemplated by this Title.

2. The Banking Act of 1933 (Act of June 16, 1933, 48 Stat. 189) provides in pertinent part:

Section 23, as amended, 12 U.S.C. 36:

The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:

* * * * *

(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation

are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. In any State in which State banks are permitted by statute law to maintain branches within county or greater limits, if no bank is located and doing business in the place where the proposed agency is to be located, any national banking association situated in such State may, with the approval of the Comptroller of the Currency, establish and operate, without regard to the capital requirements of this section, a seasonal agency in any resort community within the limits of the county in which the main office of such association is located, for the purpose of receiving and paying out deposits, issuing and cashing checks and drafts, and doing business incident thereto: *Provided,* That any permit issued under this sentence shall be revoked upon the opening of a State or national bank in such community. * * *

* * * * *

(f) The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

* * * * *

3. The Bank Holding Company Act of 1956 (Act of May 9, 1956, 70 Stat. 133), provides in pertinent part:

Section 2, 12 U.S.C. 1841:

(a) "Bank holding company" means any company (1) which directly or indirectly owns,

controls, or holds with power to vote, 25 per centum or more of the voting shares of each of two or more banks or of a company which is or becomes a bank holding company by virtue of this Act, or (2) which controls in any manner the election of a majority of the directors of each of two or more banks, or (3) for the benefit of whose shareholders or members 25 per centum or more of the voting shares of each of two or more banks or a bank holding company is held by trustees; and for the purposes of this Act, any successor to any such company shall be deemed to be a bank holding company from the date as of which such predecessor company became a bank holding company. * * *

* * * * *

(c) "Bank" means any national banking association or any State bank, savings bank, or trust company, but shall not include any organization operating under sections 611 and 612 of this title, or any organization which does not do business within the United States. "State member bank" means any State bank which is a member of the Federal Reserve System. "District bank" means any State bank organized or operating under the Code of Law for the District of Columbia.

* * * * *

Section 3, 12 U.S.C. 1842:

(a) Prior approval of Board as necessary; exceptions.

It shall be unlawful except with the prior approval of the Board (1) for any action to be taken which results in a company becoming a bank holding company under section 1841(a) of this title; (2) for any bank holding company to acquire direct or indirect ownership or control of any voting shares of any bank if, after such acquisition, such company will directly or indirectly own or control more than 5 per centum of the voting shares of such

bank; (3) for any bank holding company or sudsidiary thereof, other than a bank, to acquire all or substantially all of the assets of a bank; or (4) for any bank holding company to merge or consolidate with any other bank holding company. * * *

(b) Upon receiving from a company any application for approval under this section, the Board shall give notice to the Comptroller of the Currency, if the applicant company or any bank the voting shares or assets of which are sought to be acquired is a national banking association or a District bank, or to the appropriate supervisory authority of the interested State, if the applicant company or any bank the voting shares or assets of which are sought to be acquired is a State bank, and shall allow thirty days within which the views and recommendations of the Comptroller of the Currency or the State supervisory authority, as the case may be, may be submitted. If the Comptroller of the Currency or the State supervisory authority so notified by the Board disapproves the application in writing within said thirty days, the Board shall forthwith give written notice of that fact to the applicant. Within three days after giving such notice to the applicant, the Board shall notify in writing the applicant and the disapproving authority of the date for commencement of a hearing by it on such application. Any such hearing shall be commenced not less than ten nor more than thirty days after the Board has given written notice to the applicant of the action of the disapproving authority. The length of any such hearing shall be determined by the Board, but it shall afford all interested parties a reasonable opportunity to testify at such hearing. At the conclusion thereof, the Board shall by order grant or deny the application on the basis of the record made at such hearing.

(c) Factors governing determination of application for approval.

In determining whether or not to approve any acquisition or merger or consolidation under this section, the Board shall take into consideration the following factors: (1) the financial history and condition of the company or companies and the banks concerned; (2) their prospects; (3) the character of their management; (4) the convenience, needs, and welfare of the communities and the area concerned; and (5) whether or not the effect of such acquisition or merger or consolidation would be to expand the size or extent of the bank holding company system involved beyond limits consistent with adequate and sound banking, the public interest, and the preservation of competition in the field of banking.

(d) Limitation by State boundaries.

Notwithstanding any other provision of this section, no application shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside the State in which such bank holding company maintains its principal office and place of business or in which it conducts its principal operations unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication.

* * * * *

Section 6, 12 U.S.C. 1845:

(a) From and after the date of enactment of this Act, it shall be unlawful for a bank—

(1) to invest any of its funds in the capital stock, bonds, debentures, or other obligations of

a bank holding company of which it is a subsidiary, or of any other subsidiary of such bank holding company;

(2) to accept the capital stock, bonds, debentures, or other obligations of a bank holding company of which it is a subsidiary or any other subsidiary of such bank holding company, as collateral security for advances made to any person or company: *Provided, however,* That any bank may accept such capital stock, bonds, debentures, or other obligations as security for debts previously contracted, but such collateral shall not be held for a period of over two years;

(3) to purchase securities, other assets or obligations under repurchase agreement from a bank holding company of which it is a subsidiary or any other subsidiary of such bank holding company; and

(4) to make any loan, discount or extension of credit to a bank holding company of which it is a subsidiary or to any other subsidiary of such bank holding company.

Section 7, 12 U.S.C. 1846:

The enactment by the Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiares thereof.

* * * * *

Section 9, 12 U.S.C. 1848:

Any party aggrieved by an order of the Board under this chapter may obtain a review of such order in the United States Court of Appeals within any circuit wherein such party has its principal place of business or in the Court of Appeals in the District of Columbia, by filing in the court, within sixty days after the entry of the Board's order, a petition praying that the order of the Board be set aside. A copy of such petition shall be forthwith transmitted to the Board by the clerk of the

court, and thereupon the Board shall file in the court the record made before the Board, as provided in section 2112 of Title 28. Upon the filing of such petition the court shall have jurisdiction to affirm, set aside, or modify the order of the Board and to require the Board to take such action with regard to the matter under review as the court deems proper. The findings of the Board as to the facts, if supported by substantial evidence, shall be conclusive.

4. Louisiana Act No. 275 of 1962, § 3, provides in pertinent part:

> It shall be unlawful:
>
> (1) for any action to be taken which results in a company or a bank becoming a bank holding company as defined in this Chapter.
>
> (2) for any bank holding company or subsidiary thereof to acquire direct or indirect ownership or control of any voting shares of any bank if, after such acquisition, such company or subsidiary will directly or indirectly own or control more than 25 per centum of the voting shares of such bank;
>
> (3) for any bank holding company or subsidiary thereof to acquire all or substantially all of the assets of a bank; or
>
> * * * * *
>
> (5) for any bank holding company or subsidiary thereof to open for business any bank not now opened for business, whether or not, a charter, permit, license or certificate to open for business has already been issued. Notwithstanding the foregoing; this prohibition shall not apply to additional shares acquired by a bank holding company in a bank in which such bank holding company owned or controlled a majority of the voting shares prior to such acquisition.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. ~~703~~ 26

WHITNEY NATIONAL BANK IN JEFFERSON PARISH, *Petitioner*

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, BANK OF LOUISIANA IN NEW ORLEANS, GUARANTY BANK AND TRUST COMPANY AND STATE BANK COMMISSIONER OF LOUISIANA, *Respondents*

No. ~~798~~ 30

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY, *Petitioner*

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, BANK OF LOUISIANA IN NEW ORLEANS, GUARANTY BANK AND TRUST COMPANY AND STATE BANK COMMISSIONER OF LOUISIANA, *Respondents*

BRIEF IN OPPOSITION TO PETITIONS FOR CERTIORARI FOR RESPONDENTS, BANK OF NEW ORLEANS AND TRUST COMPANY, BANK OF LOUISIANA IN NEW ORLEANS AND GUARANTY BANK AND TRUST COMPANY

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INDEX

	Page
Questions Presented	2
Counter-statement of the Case	3
Summary of Argument	27
Argument	31
I. The Court of Appeals Correctly Enjoined the Comptroller of the Currency From Licensing, Under 12 U.S.C. § 27, a Proposed Banking Operation Admittedly Conceived, Designed, and Proposed Solely for the Purpose of Evading, Defeating and Violating the Prohibitions of the National Bank Act (12 U.S.C. 36c)	31
II. The Lower Courts Likewise Correctly Enjoined the Comptroller From Licensing Under 12 U.S.C. § 27 a Bank Operation Further Directly Prohibited by the Louisiana Bank Holding Company Act, Adopted by Louisiana Pursuant to Rights Expressly Reserved to the States by the Federal Bank Holding Company Act (12 U.S.C. 1846)	38
III. All Parties Before This Court Moved for Summary Judgment Herein and Both the District Court and the Court of Appeals, Without Any Objection by Any Party, Rendered Their Decisions on the Basis of an Express Stipulation by Counsel That This Case, Involving Undisputed Facts and Questions of Law Only, Was Ripe for Summary Judgment	45
IV. This Action Does Not Represent a Collateral Attack on a Decision of the Federal Reserve Board. Its Sole Purpose is to Enjoin the Comptroller of the Currency From Licensing an Unlawful Operation Under the National Bank Act, Which the Comptroller Alone is Authorized to Administer	49
Conclusion	54

CITATIONS

CASES: Page

Alabama Power Co. v. *Federal Power Commission*, 94 F. 2d 601 (D.C. App.) 33
Atlas v. *Eastern Airlines, Inc.*, 311 F. 2d 156, *cert. denied*, 373 U.S. 904 ..... 30, 47
Bank of New Orleans & Trust Co. v. *Federal Reserve Board*, No. 19, 788, C.C.A. 5 23
Bloeth v. *New York*, 82 S. Ct. 661 ..... 30, 48
Bracburn Securities Corp. v. *Smith*, 15 Ill. 2d 55, 153 N.E. 2d 806, *appeal dismissed*, 359 U.S. 311 ..30, 39, 40
Camden Trust Company v. *Gidney*, 112 U.S. App. D.C. 197, 301 F. 2d 521, *cert. denied*, 369 U.S. 886 7, 14, 27, 31
Commercial State Bank v. *Gidney*, 174 F. Supp. 770, *aff'd.* 278 F. 2d 871 (App. D.C.) 27, 31, 49, 53
Corker v. *Soper*, 53 F. 2d 190, *cert. denied*, 285 U.S. 540 ..... 29, 33
Corn Products Ref. Co. v. *Benson*, 232 F. 2d 554 33
Ferguson v. *Skrupa*, 372 U.S. 726 (1963) 44
First National Bank of Billings v. *First Bank Stock Corp.*, 306 F. 2d 937 (CCA 9) 29, 34
Fitzpatrick v. *Commonwealth Oil Co.*, 285 F. 2d 726 (CCA 5) 33
Francis O. Day Inc. v. *Shapiro*, 267 F. 2d 669 (App. D.C.) 33
Mercantile National Bank v. *Langdeau*, 371 U.S. 555..40, 41
Metropolitan Holding Co. v. *Snyder*, 79 F. 2d 263 28, 33, 34, 48
Milhein v. *Moffat Tunnel Improvement Dist.*, 262 U.S. 710 40
N.L.R.B. v. *Pittsburgh S.S. Co.*, 340 U.S. 498 48
Northern Securities Company v. *United States*, 193 U.S. 197 ..... 28, 32
Northwest Bank Corporation v. *Federal Reserve Board*, 303 F. 2d 832 (CCA 8) 16
Opinion of the Justices of New Hampshire, 151 A. 2d 236 40
Schinley Distillers Corp. v. *United States*, 326 U.S. 432 .33
United States v. *Lehigh Valley R. Co.*, 220 U.S. 257 ... 32
United States v. *Philadelphia National Bank*, 374 U.S. 321 (1963) 5, 40, 54
United States v. *Reading Company*, 253 U.S. 26 32

Page

Wayne Oakland Bank v. *Gidney*, 252 F. 2d 537 (CCA 6), *cert. denied*, 358 U.S. 838 ..... 27, 31, 49

Wisconsin Bankers Association v. *Robertson*, 190 F. Supp. 90, *aff'd.* 294 F. 2d 714 (App. D.C.), *cert. denied* 368 U.S. 938, *rehearing denied*, 368 U.S. 979 53

STATUTES:

Bank Holding Company Act of 1956, 12 U.S.C. §§ 1841-48 ..... 2, 15, 16, 17, 21, 22, 29, 30, 38-45, 48

Federal Rules of Civil Procedure, 56e 3

Louisiana Act 275 of 1962, Section 3(5), 2 LSA-RS 6:1001-6:1006 (1962 Supp.) 2, 25, 26, 29, 38-45, 48

Louisiana R.S. § 6:54 7

National Bank Act
12 U.S.C. § 27 ..... 2, 22, 26, 27, 31, 32, 49-54
12 U.S.C. § 36 e, f 2, 6, 17, 24, 28, 32, 34, 49-54
12 U.S.C. § 51 41
12 U.S.C. § 85 41
12 U.S.C. § 92a 41
12 U.S.C. § 214e 41
12 U.S.C. § 215 b,e 12
12 U.S.C. § 548 41

MISCELLANEOUS:

Senate Report Re: Federal Bank Holding Company Act of 1956, U.S. Code and Congressional News, 1956, pg. 2493 42

Congressional Record, 84th Cong. 2d Sess., p. 6752 42

Fletcher Cyclopedia Corporations (1963 Rev. Ed.), Vol. 1, Ch. 2, § 45, pp. 240, 241 33

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 763

WHITNEY NATIONAL BANK IN JEFFERSON PARISH,
Petitioner

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, BANK OF LOUISIANA IN NEW ORLEANS, GUARANTY BANK AND TRUST COMPANY AND STATE BANK COMMISSIONER OF LOUISIANA, *Respondents*

No. 798

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY,
Petitioner

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, BANK OF LOUISIANA IN NEW ORLEANS, GUARANTY BANK AND TRUST COMPANY AND STATE BANK COMMISSIONER OF LOUISIANA, *Respondents*

BRIEF IN OPPOSITION TO PETITIONS FOR CERTIORARI FOR RESPONDENTS, BANK OF NEW ORLEANS AND TRUST COMPANY, BANK OF LOUISIANA IN NEW ORLEANS AND GUARANTY BANK AND TRUST COMPANY

This brief is submitted on behalf of respondents Bank of New Orleans and Trust Company, Bank of Louisiana in New Orleans and Guaranty Bank and

Trust Company, Lafayette, Louisiana, in opposition to the petitions for a writ of certiorari filed on behalf of Whitney National Bank in Jefferson Parish and James J. Saxon, Comptroller of the Currency.

QUESTIONS PRESENTED

1. Should not the Court deny certiorari in this case wherein the Court of Appeals, after a carefully reasoned opinion, enjoined the Comptroller of the Currency from licensing, under 12 U.S.C. § 27, a banking operation *admittedly, concededly* and *purposefully* devised and proposed by Whitney National Bank of New Orleans, the largest bank by far in the State of Louisiana, *solely* as a means of circumventing and evading the lawful prohibitions of the National Bank Act (12 U.S.C. § 36) and Louisiana Revised Statutes 6:§§ 54 and 328?

2. Should not the Court deny certiorari in this case wherein the District Court, affirmed by the Court of Appeals, enjoined the Comptroller of the Currency from licensing, under 12 U.S.C. § 27, the opening of the proposed banking operation on the further ground that same is directly and expressly prohibited by the Louisiana Bank Holding Company Act (Act 275 of 1962, 2 L.S.A.R.S. 6:1001-1006 (1962 Supp.), enacted by Louisiana pursuant to the power specifically reserved to the States by the Federal Bank Holding Company Act, 12 U.S.C. § 1846?

3. Should not the Court deny certiorari in this case wherein one petitioner (not supported by the other) belatedly contends *for the first time after judgment of the Court of Appeals*, that this is not a summary judgment case in the face of a record (a) wherein *all* parties, *including the now complaining petitioner*, moved

for summary judgment on the basis of a carefully designated and documented record of undisputed facts, later relied on by the District Court and the Court of Appeals in their decisions, and (b) wherein counsel for the now complaining petitioner, at the specific request of the District Court and as a *condition precedent* for making his oral argument in support of his motion for summary judgment, certified on the record that "there are no facts . . . which are in dispute"?

4. Should not the Court deny certiorari in this case wherein petitioners spuriously contend that this action somehow represents an attack on a Federal Reserve Board decision, while both petitions simultaneously admit that the Comptroller of the Currency *alone* (not the Board) has the authority under the National Bank Act (12 U.S.C. § 27) to attempt to charter the proposed unlawful banking operation, and that the "sole remaining . . . step necessary to permit the opening of Whitney-Jefferson . . . was the issuance by the Comptroller, under 12 U.S.C. § 27, of a certificate authorizing it to commence the business of banking".[1]

RESPONDENTS' COUNTER-STATEMENT OF THE CASE

This case was decided by the District Court, pursuant to the provisions of Rule 56 of the Federal Rules of Civil Procedure, on the basis of cross-motions *by all parties* for summary judgment. The Comptroller of the Currency, represented by the United States Attorney for the District of Columbia, the Department of Justice and his own General Counsel, was the first party to move for summary judgment (J.A. 222). Respondents thereupon cross-moved for the same relief

[1] See Whitney's petition, pp. 6, 7; Comptroller's petition, pp. 5, 7, 8.

(J.A. 274). Petitioner, Whitney National Bank in Jefferson Parish, thereupon also moved for summary judgment (J.A. 317). All parties filed written statements, as required by Local Civil Rule 9(h) of the District Court in summary judgment proceedings, specifying the facts upon which there was no genuine issue and which supported the motions for summary judgment (J.A. 223, 275, 318). When these motions came on to be heard, District Judge McLaughlin declined to hear argument until it was "fully agreed by all that the question to be presented to the Court is strictly a question of law" (J.A. 431). Counsel for petitioner Whitney, Mr. Dean Acheson, thereupon certified to the Court (J.A. 431,432):[2]

> "*Mr. Acheson*: Your Honor, I would say as to that, there is no disagreement as to the facts between the intervening defendant and the plaintiffs . . . *There are no facts as such which are in dispute.* This is my assertion to your Honor." (Italics supplied).

The said *undisputed facts* upon which respondents relied in their Complaint (J.A. 6-20), in support of their motions for temporary restraining order and preliminary injunction (J.A. 20, 21; 174-191; 221, 225-273), in support of their cross-motion for summary judgment (J.A. 275-293), and during *all* of the proceedings before the Court of Appeals for the District of Columbia Circuit (*and as drawn almost exclusively from papers filed by petitioners themselves in this action*) are as follows:

The Whitney National Bank of New Orleans is the largest bank by far in the State of Louisiana (Comp.

[2] As stated, no issue was raised on this subject until *after* the Court of Appeals rendered its judgment.

Ex. 5, J.A. 99). It is one of the largest financial institutions in the entire southern portion of the United States (J.A. 99, 275). For approximately 80 years, Whitney has operated its banking offices and facilities wholly within the City of New Orleans, Parish of Orleans, Louisiana (the City and Parish being coterminous). Through these operations, *admittedly and concededly still properly and constitutionally restricted by a long-standing combination of Federal and Louisiana statutory law to the limits of Orleans Parish*, Whitney has grown to a position of banking dominance where it possesses (J.A. 275)—[3]

approximately	$500,000,000	—in resources
"	13,835,000	—in undivided profits
"	$ 27,200,000	—in its surplus account
"	39%	—of the total deposits in *all* banks in Orleans Parish
"	44%	—of all deposits of individuals, partnerships and corporations in the Parish.

Contrary to the impression sought to be conveyed by petitioners, Whitney National Bank today, as in the past, continues to maintain this position of dominance. It controls and possesses more deposit and loan business than the second and third largest banks in New Orleans combined (J.A. 275). It also

[3] In this connection, it is interesting to note by way of comparison, that the bank merger enjoined by this Court in *U. S. v. Philadelphia National Bank*, 374 U.S. 321 (1963) was deemed violative of the Clayton Act because: *after the merger, the resulting bank* would control "*at least 30%* of the commercial banking business in the . . . Philadelphia metropolitan area". This Court stated, at page 364: "Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, *we are clear that 30% presents that threat.*" (Italics supplied). Here, Whitney controls approximately 40% or more.

possesses at its offices in New Orleans deposits of individuals, partnerships and corporations emanating from the East bank of the Mississippi River in *Jefferson Parish* (i.e. beyond the limits of Orleans Parish) in an aggregate amount exceeding 3% of such deposits enjoyed by *all banks* having their head offices in the same area of Jefferson Parish (J.A. 276). In the record before this Court, Governor Robertson of the Federal Reserve Board formally describes the concentration of banking resources possessed by Whitney National Bank as (J.A. 111)—

> "... a centralization of banking power of major proportions in individual hands, to a degree that, to my knowledge, is without parallel in the American banking system."

As stated above, both petitioners (the Comptroller of the Currency and Whitney National Bank in Jefferson Parish) have consistently and openly conceded before the Courts that Whitney National Bank of New Orleans remains today, as it has been for many years past, *constitutionally and lawfully prohibited by a combination of Federal and Louisiana law* from opening banking offices beyond the limits of New Orleans. This concession is found again at page 4 of Whitney's instant petition to this Court, as follows:

> "Both Whitney-New Orleans and all other New Orleans national banks are prevented by 12 U.S.C. § 36(c) from establishing branches outside Orleans Parish. That section provides that national banks may establish branches only within the geographical limits imposed by state law on state banks. Louisiana state banks in New Orleans with assets of $100,000, or more are prohibited from establishing branches outside Orleans Parish by Louisiana Revised Statutes 6:54 and 328."

Substantially the same admission appears at page 3 of the Solicitor General's petition, where he states on behalf of the Comptroller:

> "However, State law (La. R.S. 6:54) prohibits banks from opening branch offices in parishes other than their home parish and these geographical limitations are made applicable to national banks by the Banking Act of 1933 (12 U.S.C. 36)."[4]

In spite of its clear recognition and understanding of these statutory prohibitions, Whitney-New Orleans nevertheless proceeded to spend several years studying various "devices" for the circumvention and evasion of same. It carefully considered and categorically rejected the possibility of an "*affiliate arrangement*", such as was involved in *Camden Trust Company* v. *Gidney, Comptroller of the Currency*, 112 U.S. App. D.C. 197, 301 F. 2d 521, cert. denied, 369 U.S. 886 (1962). With regard to Whitney's rejection of a Camden-type "*affiliate arrangement*", the President of Whitney-New Orleans, in formal testimony before the Federal Reserve Board, put it this way (Comp. Ex. 4, J.A. 74):

> "If branch banking were permitted in Jefferson Parish, I wouldn't be here because it would be much simpler to have it by way of a branch. . . . But that is not possible. We see no signs of it coming about by legislative action . . . and our

[4] In *United States* v. *Philadelphia National Bank*, *supra*, this Court recognized the validity and substance of these branching prohibitions, by stating, at page 325: ". . . but branching, which is controlled largely by state law—and prohibited altogether by some States—enables a bank to extend itself only to state lines and often not that far."

problem has been—*we have been unwilling to go with an affiliate which we couldn't hold onto necessarily.*

"*It (an affiliate) doesn't become a part of our organization; it is just sort of hanging loosely. You have these conflicts of interest and it is awkward.*

"*The thing that makes this (the holding company approach) interesting to us is the ability to approach the branch phase of it . . .*" (Italics supplied).

As indicated by that testimony, Whitney-New Orleans finally decided to try a "holding company approach", admittedly as a means of circumventing the Federal and State statutory prohibitions. In this particular connection, the President of Whitney-New Orleans also testified (Comp. Ex. 4, J.A. 64, 65):

"Under present laws in our state, the Whitney is not permitted to establish branches outside the Parish of Orleans.

"There is a rapidly growing industrial area in adjoining Jefferson Parish up river from Orleans, ...

"The management of the Whitney National Bank has been studying and weighing alternative methods of entering Jefferson Parish . . . and to participate in the further growth of that area. . . .

"The officers of the Whitney National Bank determined in 1960 that the holding company was the proper solution, provided we could put the ownership of the present Whitney National Bank of New Orleans stock into such a company *and, by the use of Whitney assets, establish a bank in Jefferson Parish, which would likewise be fully owned by the holding company.*" (Italics supplied).

A very surprising and unusual aspect of the case in the Courts below was the open, sworn admission by the Comptroller of the Currency that his office and top officials therein (*including the Comptroller himself*) had actually met with the President of Whitney-New Orleans for the purpose of furnishing *advance* private advice and guidance from the very outset as to how the Federal and State branching statutes might be circumvented and evaded (J.A. 42, 43). The Comptroller, in a sworn affidavit, stated (J.A. 42, 43):

> "... the Whitney National wished to explore with the Comptroller whatever ... means were available for ... expansion into this growing area ... The formation of an affiliate bank was discussed and the formation of a holding company was also discussed. The bank management felt that a holding company which would own 100% of the stock of both the old bank and the new bank would be preferable to the formation of an affiliate of which the controlling stock would be held by the same persons who control Whitney-New Orleans, but which, in view of the wide stock distribution of Whitney-New Orleans, would invariably have a minority of stockholders who did not own stock in both banks. The existence of the minority stock interest in each bank, which did not hold corresponding shares in the other, was considered by the Whitney Management to be an undesirable situation because it could conceivably hamper the most efficient and effective day-to-day operation of the two banks. *Since the same group would be managing both banks*, it was thought that situations could arise in which it would be impossible for the interests of two different groups of minority stockholders to be fully protected. *For this reason, the Whitney management ... elected to use a holding company for the purpose of establishing a ... bank in Jefferson Parish.*

> "*At all times the applicable Louisiana statutes forbiding the establishment of branch offices across parish lines were fully considered* . . ." (Italics supplied).

Having obtained such a favorable *ex parte* nod from the Comptroller of the Currency before even initiating Whitney's plan for evasion of the Federal and State branching prohibitions, the President of Whitney-New Orleans was thus able repetitiously to represent when he later appeared for testimony before the Federal Reserve Board (Comp. Ex. 4, J.A. 65, 66):

> "The Comptroller of the Currency has concurred in a program which has the effect of putting the ownership of the present Whitney National Bank stock into the Whitney Holding Corporation, . . . *and to the establishment of the Whitney National Bank in Jefferson Parish with funds from the present Whitney National Bank, the stock of which would be also owned by the holding company.* . . .
>
> "The Comptroller has already concurred in the acts required to consummate the first step *and granted preliminary approval of an application for charter for the Whitney National Bank in Jefferson Parish.* . . .
>
> "We understand that he has advised you that these charters will be issued if and when the Federal Reserve Board approves this application for a holding company. . . ." (Italics supplied).

This private advance approval by the Comptroller also caused the Whitney National Bank of New Orleans to set into motion a series of intricate corporate maneuvers, the *sole purpose* being to accomplish indirectly and by evasion that which was admittedly unlawful for Whitney to accomplish directly, i.e., its

expansion into Jefferson Parish (J.A. 278, 279). Although complicated in execution, these corporate maneuvers were simply designed to draw funds from the Whitney National Bank of New Orleans, with which to establish totally controlled banking offices and facilities in Jefferson Parish and later elsewhere in Louisiana:

> *First*: With $350,000 of its capital funds, Whitney National Bank of New Orleans created Whitney Holding Corporation, *a corporation organized under the laws of Louisiana.*
>
> *Second*: Solely with the $350,000 contributed by Whitney-New Orleans, Whitney Holding Corporation organized a so-called "*phantom bank*" named Crescent City National Bank, (Crescent), to which the Comptroller of the Currency agreed to issue a national bank charter, *knowing full well that Crescent would exist in name only, and would never engage in the banking business.*[5]

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[5] A Federal Officer's issuance of a national bank charter to a non-existent bank, knowing well it was never intended to be opened and operated as a national bank and that its sole purpose was to eliminate dissenting stockholders of Whitney National Bank of New Orleans who did not want to participate in the evasion of federal and state laws (there were 12,145 dissenting shares out of approximately 100,000 voting on the matter), was perhaps the second most bizarre aspect of the case below. This maneuver caused a member of the Federal Reserve Board to state (J.A. 110): "In order to *eliminate minority stockholders* of Whitney National Bank of New Orleans *and thereby to* insure that Whitney-Holding Corporation will be able to elect all members of the bank's board of directors, the plan before the Board includes a so-called '*phantom bank*' *merger*, which makes it impossible for a [dissenting] stockholder to retain his stock interest therein. The purpose of centralizing control of the holding company and its banks in the hands of very few individuals—perhaps only one individual—is apparent from other features of the proposal."

Third: Whitney-New Orleans and Crescent, which latter entity never actually operated for an instant as a national bank (and Whitney Holding Corporation), entered into a consolidation or merger agreement, merging Whitney-New Orleans into the "*phantom*", Crescent. The name of the merged bank was then immediately changed back to Whitney National Bank of New Orleans.

Fourth: Whitney National Bank of New Orleans shareholders surrendered their stock for cancellation, and accepted in exchange Whitney Holding Corporation shares, dissenting stockholders, if any, being eliminated by the purchase of their shares under provisions of the National Bank Act (12 U.S.C. § 215(b), (e)).[6] Thus, Whitney Holding Corporation thereupon owned 100% of the stock of Whitney National Bank of New Orleans, and the surviving stockholders of Whitney National Bank of New Orleans owned 100% of the stock of Whitney Holding Corporation.

Fifth: Whitney National Bank of New Orleans then provided $650,000. of its capital funds to Whitney Holding Corporation "with which Whitney Holding Corporation [was to] cause to be created Whitney National Bank in Jefferson Parish, receiving all [of its, the Jefferson Bank's] stock therefor." (Comp. Ex. 6, J.S. 112-114).[7]

---

[6] 12,145 shares out of about 100,000 actually voted against the entire device. In fact, dissenting stockholders of Whitney-New Orleans even appeared before the Federal Reserve Board and vehemently protested against federal recognition of this illegal circumvention of the statutes (J.A. 83-88).

[7] In order to enable the Court more quickly to obtain a simple analysis of these corporate exercises promoted and put into effect by Whitney-New Orleans, respondents respectfully direct the Court's attention to the series of charts which appear in the Joint Appendix (J.A. 281-284) diagramming each of these corporate activities. . . .

The President of Whitney-New Orleans candidly and succinctly summarized the end result of these corporate maneuvers for the Federal Reserve Board as follows (Comp. Ex. 4, J.A. 68):

> "The Whitney National Bank of New Orleans will continue in exactly the same form as it is now except for the withdrawal of $650,000. in capital funds which will be put into the Jefferson Parish unit as capital for it."

Upon the further *ex parte* recommendation of the Comptroller of the Currency (and before Whitney-New Orleans appeared before the Federal Reserve Board in support of its holding company proposals), Whitney-New Orleans called a meeting of its stockholders and apprised them of its plans to enter Jefferson Parish and the reasons for it (Comp. Ex. 4, J.A. 66). In the notice which announced this meeting, the President of Whitney-New Orleans advised his shareholders as follows (J.A. 31, 21):

> "We are enclosing a letter in accordance with the requirements of the United States Comptroller of the Currency which outlines in detail the proposed program. It is important to bear in mind that under the plan *all authorized shares of the Whitney Holding Corporation will be distributed to you, the stockholders of the Whitney National Bank, in exchange for your presently held stock. You will then own the same proportionate interest as you now have in the Whitney National Bank in all the assets of the holding corporation, which obviously includes all of the assets of the present Whitney National Bank. Control of the Holding Corporation management will rest . . . with the holders of a majority of the stock. . . .*
>
> "We are firmly convinced, after careful consideration of the alternatives, that your *common owner-*

.ship of *all* of Whitney National Bank of New Orleans stock and *all* of the stock of a Whitney National Bank in Jefferson Parish *by a holding company to be owned by you* is the soundest method of *pooling all* of the *deposits* of our customers *and of our capital funds* for their use and for the development of this community. From the depositors' point of view, those in the smaller bank will be assured *of the same management* which directs the larger one without possibility of interruption. *They will be assured of access to the large loan limits of the combined banks. They will have the security which arises out of the fact that the large and the small bank have identical ownership as well as management. . . .*

"Under the *holding company approach*, the relationship is *completely owned by the stockholders of the holding company*, who will be *all* the present stockholders of the Whitney National Bank and their successors.

"By reason of the common owership of the two banks in a holding company there can arise no conflict of interest between them as there can between *affiliated banks*.[8] There will be no minority stockholders to be affected.

"From the customer point of view, there will be no conflict of interest arising out of the manner in which the customer sees fit to divide his business *between the commonly owned banks in the two parishes. He will have the full benefits of a relationship with the large bank and its officers.*

"Because of the *permanent relationship* between the large and the smaller bank, the smaller one can operate safely with a smaller capitalization. . . .

[8] The Court's attention is directed again to the repeated rejections by Whitney-New Orleans, on the ground of alleged "conflict of interest" possibilities, of an "*affiliate arrangement*", such as the one involved in *Camden Trust Company* v. *Gidney*, *supra*.

> "Finally, this holding company group broadens banking possibilities for the future from the point of view of our shareholders. . . . It will give metropolitan New Orleans the soundest form of banking unit *which can accumulate and pool banking resources in this community where they can be used to greatest advantage in the further development of the entire area.* (Italics supplied).

As indicated before, after its creation by Whitney National Bank of New Orleans, Whitney Holding Corporation made application to the Federal Reserve Board *solely* for the purpose of gaining the Board's approval, under the provisions of 12 U.S.C. § 1842 (The Federal Bank Holding Company Act of 1956), of the Holding Corporation's proposed acquisition of all of the shares of the aforementioned Crescent City corporation and Whitney National Bank in Jefferson Parish. In accordance with the requirements of 12 U.S.C. § 1842 (b), the Board notified the Comptroller of the Currency of the application and sought his views (J.A. 286). Having already given his *ex parte* approval to the plan before it was put into execution, the Comptroller, in three short paragraphs of a letter to the Board, gave his full written approval of the Whitney proposal (J.A. 166, 167; 286). The Comptroller failed even to mention or comment upon the legality or illegality of the proposals under 12 U.S.C. § 36 (*c*), and La. R.S. 6:54 (J.A. 166, 167).[9]

---

[9] In fact, the Comptroller apparently led counsel for Whitney-New Orleans to feel it was proper for him orally to represent before the Board that the Comptroller wanted to be assured Whitney would be allowed to go forward "with the meat of the program, which was moving into Jefferson Parish"; and that the Comptroller felt this was "a desirable banking feature" (Comp. Ex. 4, J.A. 93, 94).

This favorable action by the Comptroller made it unnecessary for the Federal Reserve Board to hold any statutory public hearing in Louisiana on the application under the provisions of 12 U.S.C. § 1842 (*Northwest Bank Corporation* v. *Federal Reserve Board*, 303 F. 2d 832 [CCA 8, 1962]). However, when the Board did accept a presentation of views on the application at its headquarters in Washington and when dissenting stockholders of Whitney-New Orleans appeared and vehemently protested the illegality of the entire proposal under Federal and State law, the Board, on its own motion, again wrote to the Comptroller of the Currency advising him that charges had been made that the proposals "were in violation or circumvention of existing law" (J.W. 423-425). The Board then stated to the Comptroller (J.A. 424):

> In view of the bearing that these matters might have on the Board's decision on Whitney Holding Corporation's application, the Board would appreciate any comments that you may have . . ."

The Comptroller, however, refused to comment on any of these matters (J.A. 425, 426). Instead, he replied as follows (J.A. 426):

> "Other comments with respect to the legality and merits of the holding company are matters on which a previous Comptroller of the Currency has expressed himself; *therefore, further enlargement on the subject is deemed undesirable.*" (Italics supplied).

But, the record is barren of any expressions by any Comptroller of the Currency, past or present, regarding the lawfulness of "the holding company approach" under the applicable Federal and State statutes (see

J.A. 166). The fatal effect of the Comptroller's strange refusal to supply such information or comments to the Federal Reserve Board is patent when it is fully understood that the Board declines even to consider or rule on such matters itself, absent advice from the Comptroller (J.A. 168, 286, 287). The Board took the position in this very case that all matters "*relating largely to an alleged violation of provisions of the National Bank Act*" *are for the Comptroller, not the Board* (J.A. 168, 286, 287).

Thus, when the Board rendered a decision on May 3, 1962 approving the application of Whitney Holding Corporation to proceed to acquire the shares in Crescent and Whitney Jefferson, it did so without even referring to 12 U.S.C. § 36 (c), 12 U.S.C. § 1846 or the Louisiana law prohibiting branching by national and state banks beyond parish lines, or the effect these statutes might have had upon its decision (J.A. 287). In fact, having received an unqualified green light from Comptroller Saxon, the Board candidly admitted it was authorizing Whitney-New Orleans, through a holding company device, to evade the prohibitions otherwise imposed upon it by the laws (J.A. 99, 100). The Board accordingly ruled (J.A. 99, 100, 101):

> "Under the law of Louisiana, a bank may not establish branches outside of the parish in which its head office is situated. . . . The boundaries of Orleans Parish are conterminous (sic) with the boundaries of the City of New Orleans, and consequently banks situated in New Orleans (including national banks) may not establish branches beyond the city limits. . . .
>
> " . . . In accordance with the requirement of section 3(b) of the Act, the Comptroller of the Currency was asked to submit his views and recom-

mendations with respect to the pending application. In a letter dated October 11, 1961, Comptroller . . . recommended approval.

> "*The stated purpose of the proposed holding company system is to enable an organization centered about Whitney-New Orleans to provide banking services not only through its existing 12 offices within the City of New Orleans but also through offices in the East Bank of Jefferson Parish. The holding company system will be under the direction of the present executive management of Whitney-New Orleans; in fact, for present purposes the holding company itself is simply the means by which Whitney banking offices may be established and operated in East Bank.* Consequently, the character of the management and the prospects of the Applicant and its two proposed subsidiary banks *may be evaluated largely on the basis of the financial history and condition, character of management, and prospects of Whitney-New Orleans.*
>
> "The financial history of Whitney-New Orleans has been satisfactory. The condition of that bank is sound and its management is regarded as satisfactory. Accordingly, it is believed that the management of Applicant and Whitney Jefferson will be satisfactory and *the prospects of the holding company, which depend principally upon the prospects of Whitney-New Orleans, are favorable.*" (Italics supplied).

This bald endorsement by the federal government under these circumstances of a device admittedly designed flagrantly to circumvent and violate both Federal and State law was a bit too much for Governor Robertson of the Federal Reserve Board. In a dissenting opinion, he stated (Comp. Ex. 5, J.A. 109-111):

> "Whitney National Bank of New Orleans is the largest banking institution of the City of New

Orleans and the State of Louisiana. It controls in the neighborhood of 40% of the deposit and loan business of all New Orleans banks—more than the second and third largest banks combined. *The proposal before the Board of Governors would place control of this bank in Whitney Holding Corporation and thereby would overcome the effect of the branch banking laws of Louisiana, which prevent Whitney from establishing any offices outside of . . . the City of New Orleans. In other words, by this means the Whitney banking organization would escape the legal limitations that now permit it to have offices only within the City of New Orleans.*

"In my judgment, one of the basic purposes of the Bank Holding Company Act—to prevent undue concentration of banking power in holding companies—would be unjustifiably defeated by approval of the creation of a holding company system to control the predominant bank of a major metropolitan area and additional banks within that area. . . .

". . . In this case, . . . banking offices affiliated with the largest financial institution in the area would be competing with small local banks, including a bank that opened for business only two months ago in the same shopping center in which it is proposed to locate one of the offices of Whitney-Jefferson. The effect of the entry of Whitney-Jefferson at this time could be significantly detrimental to this new bank and to another small bank with which Whitney-Jefferson would directly compete. . . ."

Governor Robertson then went on to conclude (J.A. 111):

"In brief, the plan before the Board seems designed to minimize the participation of stockholders, and even of directors, in the control and

management of the holding company and its subsidiary banks. *This appears to be the common objective* of (1) eliminating minority interests in subsidiary banks, . . . (2) the absence of cumulative voting in the bank holding company, (3) the provision for a board of directors that may consist of only three members, and (4) the almost unprecedented provision for use of proxies at directors' meetings. Taken together, these features of the proposal *reflect an arrangement by which power to direct and control the holding company system, including its banks, could be concentrated in the hands of a single individual.* In my judgment, such an undemocratic arrangement is particularly inappropriate in a system that is to consist of national banks, *when it is considered that none of the three latter features is permissible under the National Bank Act and related Federal statutes.* It should not receive this Board's stamp of approval.

"The proposal before the Board would . . . provide a vehicle for enhancing the existing high degree of banking concentration in the area and would permit a centralization of banking power of major proportions in individual hands, to a degree that, to my knowledge, is without parallel in the American banking system. For these reasons, I conclude that the creation of the proposed holding company system would be contrary to the public interest and therefore should be denied." (Italics supplied).

In the face of this decision by the Federal Reserve Board, the State Bank Commissioner of Louisiana immediately sought an opinion from the Attorney General of Louisiana as to whether Whitney's holding company device was lawful (J.A. 161). The Attorney General issued the following written opinion, in substance (J.A. 163, 164):

> "... There is a general principle of law that corporate entities must be disregarded where they are made the implements for avoiding a clear legislative purpose. To allow the establishment of a bank holding company to avoid and circumvent the branch banking laws of our State is, in our opinion, prohibited, if not by the letter, by the spirit of our law. ...
>
> "It is the opinion of this office, therefore, that a bank holding company may not circumvent the branch bank laws of our State by the acquisition of a controlling interest in a subsidiary which is located in a parish other than the domicile of the parent company."

The Louisiana State Bank Commissioner thereupon sent a copy of this opinion by the Attorney General to the Federal Reserve Board (J.A. 165). He requested a rehearing (J.A. 165). Other of the respondents herein also petitioned for reconsideration (J.A. 167). The Board refused to reconsider the matter, stating that the questions raised "relate largely to an alleged violation of provisions of the National Bank Act, which is administered by the Comptroller of the Currency" (J.A. 168).

Said ruling by the Board was subject to judicial review, upon the filing of a petition in the Fifth Circuit Court of Appeals *within 60 days after May 3, 1962* (12 U.S.C. § 1848; J.A. 288). Upon such review, the Court has jurisdiction under 12 U.S.C. § 1848—

> "to affirm, set aside, or modify the order of the Board and to require the Board to take such action with regard to the matter under review as the Court deems proper."

However, before any petition for review could be prepared and filed and before the action of the Federal

Reserve Board could become final under 12 U.S.C. § 1848, or under the Regulations of the Federal Reserve Board itself, the Comptroller of the Currency, on May 15, 1962 (*just 15 days after the Federal Reserve Board acted*) announced gratuitously that he had already approved Whitney's program and had directed that same proceed to completion "on or after May 24, 1962" (*just 21 days after the Federal Reserve Board acted*) (J.A. 34). By June 20, 1962 (*also before the 60-day appeal period prescribed by 12 U.S.C. § 1848 had expired*) Comptroller Saxon was further announcing that absent the granting of an injunction by the District Court in the case below, he would consider it his "duty . . . to issue a Certificate of Authority to Whitney-Jefferson" forthwith (J.A. 47, 289).

Accordingly, the Complaint for Declaratory Judgment and Injunction herein was filed on June 9, 1962 (J.A. 6). The action was grounded on 12 U.S.C. §§ 27, 36, 1841 and 1846, and prayed for an injunction enjoining the Comptroller of the Currency from issuing a certificate under 12 U.S.C. § 27 licensing the commencement of Whitney's unlawful banking operations in Jefferson Parish, Louisiana. The Comptroller, upon being advised of the filing, voluntarily agreed to withhold issuance of his Certificate of Authority to Whitney-Jefferson until the Motion for Preliminary Injunction herein could be heard and determined (J.A. 289). Two of the respondents herein also timely filed in the Fifth Circuit a petition to review the ruling of the Federal Reserve Board which approved the holding company application under 12 U.S.C. § 1842 (b) (*Bank of New Orleans and Trust Com-*

pany et ano. v. *Board of Governors of the Federal Reserve System*, No. 19,788, C.C.A. 5).[10]

In the meantime, and without any fault of respondents contributing thereto, petitioner Saxon suddenly refused to continue voluntarily to withhold the issuance of his Certificate (J.A. 174, 175; 178-182). The parties accordingly apeared before the District Court, and after a hearing, Judge Hart granted a Temporary Restraining Order directing the Comptroller to withhold his Certificate until the motion for preliminary injunction could be heard (J.A. 176, 177).

The Motion for Preliminary Injunction came on to be heard on July 6, 1962 before Judge Holtzoff (J.A. 225-273). During these proceedings, the Department of Justice attorney representing the Comptroller readily stated "there can be no real question" about the fact "that the Whitney-Jefferson operation is a means used for the Whitney Bank in New Orleans to pursue banking business in Jefferson Parish" (J.A. 257). The following colloquy thereupon ensued between the Court and counsel for the Comptroller (J.A. 260):

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[10] On October 7, 1963, after receiving extensive briefs and hearing oral argument by all parties, including the Government and Whitney Holding Corporation, the Fifth Circuit entered the following Order:

> "In view of the decision of the Court of Appeals of the District of Columbia in *Whitney Nat'l Bank in Jefferson Parish* v. *Bank of New Orleans and Trust Company*, Nos. 17,672 and 17,681, August 14, 1963, decision in the present case will be withheld pending determination in the District of Columbia case of the application for rehearing and any subsequent proceedings involving application for a writ of certiorari."

On December 11, 1963, the Fifth Circuit denied Whitney's motion to vacate that ruling.

"*The Court*: But isn't this true, Mr. Seaman, that if this device is legal . . . , then you might as well repeal Section 36 (c)?

"*Mr. Seaman*: No, . . . Your Honor, . . . 36 (c) applies only to branches.

"*The Court*: I understand. But it would become a dead letter because any bank that wanted to establish a branch would create a holding company as an intermediary?

"*Mr. Seaman*: Yes, Your Honor."

The Court was also advised by counsel for petitioner Whitney during argument on the preliminary injunction that Louisiana was then considering remedial emergency legislation, which would become law "on Monday" (3 days hence) and which would directly prohibit any Louisiana—incorporated bank holding company (such as Whitney Holding Corporation) and its subsidiaries from opening for business any bank not yet open (J.A. 264). Counsel urged the Court not to enjoin the Comptroller so that Whitney Holding could open its Jefferson offices before that law became effective (J.A. 264, 265). The Court replied that it was "not going to rush the matter in order to prevent an action on the part of the Louisiana or any other state legislature" (J.A. 264). The Court thereupon granted the preliminary injunction to preserve the status quo (J.A. 272, 273).

As indicated, since late May 1962, the State of Louisiana, never before confronted with the monopolistic plague of bank holding company operations but now confronted with a sudden, totally unexpected, arbitrary Federal administrative approval of what was considered a brazen attempt by the largest bank in the State to circumvent and evade the prohibitions of Fed-

eral and State branching statutes merely through the device of a holding company intermediary, had been considering, in its House and Senate, emergency legislation authorized to the States by the reservation contained in the Federal Bank Holding Company Act, 12 U.S.C. § 1846. This legislation, Act 275 of 1962, was passed by the House on June 27, 1962 by a vote of 80 to 16 (J.A. 333, 334). It passed in the Senate on July 4, 1962, and was signed into law on July 10, 1962, *the same day on which the Preliminary Injunction herein was signed by the District Court* (J.A. 295,296, 221). This Act, at Section 3(5) and as here pertinent, provided:

> "It shall be unlawful . . . (5) for any bank holding company or subsidiary thereof to open for business any bank not now opened for business . . ."

As stated above, all parties thereupon moved for summary judgment. It was stipulated and agreed that "the issue of the alleged violation of Louisiana Act 275 of 1962 is to be treated in all respects as raised in the pleadings herein" (J.A. 384, 385). In other words, the parties agreed in writing that the Court should determine whether Act 275 of 1962 effectively precluded the lawful issuance of a Certificate to Whitney-Jefferson, in addition to the question of whether the lawful issuance of a Certificate was likewise precluded by the original Section 36(c) issues raised by the pleadings.

Petitioners thereupon attacked Act 275 of 1962 as unconsitiutional. The Louisiana State Bank Commissioner then moved to intervene (J.A. 346, 347). All parties consented to his intervention (J.A. 385). The District Court thus granted his motion and added him as a plaintiff (J.A. 385, 386).

After extensive briefing and oral argument of the motions for summary judgment, the District Court (Judge McLaughlin) granted respondents' cross-motions (J.A. 435-438). The Court ruled, in substance, that (a) the Comptroller of the Currency had no discretion to issue a Certificate under 12 U.S.C. §27, licensing an operation prohibited by law; (b) Act 275 of 1962 was constitutional and authorized to Louisiana by 12 U.S.C. § 1846; and (c) Act 275 rendered unlawful Whitney's proposed operations in Jefferson Parish, and thus the Comptroller was to be permanently enjoined from chartering same under 12 U.S.C. § 27. Judge McLaughlin went on to state (J.A. 438):

> "The Court having upheld the constitutionality of Louisiana Act 275 in its application to defendant making it unlawful for said defendant to open in Louisiana, the Court deems it unnecessary to address itself to the cogent arguments put forth by counsel on the question of the applicability of 12 U.S.C. 36(c) as to whether, by its terms, it proscribes in these circumstances, the setting up of the type of bank herein involved and secondly, if not proscribed by the terms of the statute, whether this Court ought to look behind the corporate form of the new bank to determine whether or not it is in violation of Section 36(c)."[12]

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[12] The District Court nevertheless made detailed *Findings of Fact* in support of its Judgment, and these clearly included all of the essential undisputed facts necessary to support a ruling on the Section 36(c) issues (J.A. 445-448). The Court's attention is directed particularly to Findings 7, 8 and 17 (J.A. 446, 448). These clearly establish the fallaciousness of the positions taken by petitioner Whitney under the second question raised in its petition (at pages 2, 3), and its allegation that the Court of Appeals disposed of the case "on the basis of a view of the facts which was *never* litigated in the District Court, which derives *no* support from the findings of that court, and . . . as to which no evidence was introduced" (See Whitney petition, pg. 11).

Petitioners both appealed (J.A. 452, 453). The Court of Appeals, consisting of Circuit Judges Miller, Washington and Danaher, affirmed the judgment of the District Court, holding, in substance, at 323 F. 2d 290:

> "Consequently, we pierce the corporate veil which shrouds this intricate transaction, and see Whitney-New Orleans attempting to establish a branch in Jefferson Parish in violation of 12 U.S.C. § 36 (c). It is a bootstrap operation by which Whitney-New Orleans, using its own funds in corporate maneuvering, seeks to establish a branch in prohibited territory . . . .
>
> "We think it clear that the opening of Whitney-Jefferson is prohibited by 12 U.S.C. § 36 and that consequently, the Comptroller was properly enjoined from issuing a Certificate of Authority for it to begin business . . ."

Both the Comptroller and Whitney petitioned for rehearing *en banc*. These petitions were unanimously denied on October 17, 1963.[13] The instant petitions for a writ of certiorari ensued.

SUMMARY OF ARGUMENT

I. It is settled law that the Comptroller of the Currency has no discretion under the National Bank Act (12 U.S.C. 27) to issue a Certificate of Authority to license a banking operation prohibited by law, and if he attempts to do so, the Courts will enjoin him (*Wayne Oakland Bank* v. *Gidney*, 252 F. 2d 537, *cert. denied* 358 U.S. 838; *Camden Trust Company* v. *Gidney*, 301 F. 2d 521, *cert. denied* 369 U.S. 886; *Commercial State Bank* v. *Gidney*, 174 F. Supp. 770, affd.

[13] Two Judges abstained.

278 F. 2d 871). The National Bank Act itself (12 U.S.C. 27) proscribes the licensing of any proposed banking operation until it is found to be *"lawfully entitled to commence . . . business,"* and the Certificate may be withheld whenever the proposed operation is found to have been organized *"for any other than the legitimate objects contemplated" by the National Bank Act.*

In the case at bar, both petitioners concede that Whitney-New Orleans was *absolutely prohibited* by the National Bank Act (12 U.S.C. 36c, f) from opening any offices in Jefferson Parish, Louisiana; and that *solely* for the purpose of evading and defeating those statutory prohibitions, Whitney New Orleans organized its own holding company, which, in turn, then proposed to open, with $650,000 drawn out of the funds of Whitney New Orleans, Whitney offices in the prohibited location. The Court of Appeals obviously correctly enjoined the Comptroller of the Currency from licensing the opening of these proposed illegal operations under the language of 12 U.S.C. 27 itself, and under the long standing rule, established by this Court and others in the Federal system, that corporate forms and devices, including holding company intermediaries, shall be disregarded whenever same are set up or used for the purpose of evading or defeating a statutory prohibition (*Northern Securities Company* v. *United States,* 193 U.S. 197; *Metropolitan Holding Co.* v. *Snyder,* 79 F. 2d 263, and other cases cited in Point I of this brief).

This case accordingly presents *no* new, substantial federal question. It has, in fact, been settled since the early 1930's that whenever officers or shareholders of a national bank create a holding company specifically

for the purpose of evading or defeating a provision of the National Bank Act, the holding company must be ignored in order to sustain the Act (*Metropolitan Holding Co.* v. *Snyder, supra; Corker* v. *Soper,* 53 F. 2d 190, *cert. denied,* 285 U.S. 540 (1932)). Nor does this case present any conflict between circuits. The last-cited decisions of the Fifth and Eighth Circuits are wholly in accord with the ruling of the District of Columbia Circuit herein; and the same fundamental rule found in *First National Bank of Billings* v. *First Bank Stock Corporation,* 306 F. 2d 937, 942 (C.C.A. 9, 1963) was actually adopted and followed by the Court of Appeals in the instant case, where the Court stated:

> "We agree with the Ninth Circuit that the corporate veil should be pierced whenever one bank is "doing business through the instrumentality of" the other or "in the same way as if the institutions were one." "The unitary type of operation", said in the Billings opinion to be "characteristic of branch banking" is present here."

II. The licensing of Whitney's proposed offices in Jefferson Parish was correctly enjoined, not only because such offices were conceived and proposed as part of a clear-cut attempt to evade and defeat the prohibitions of the National Bank Act, *but also* because the opening of same is *directly prohibited* by Section 3(5) of the Louisiana Bank Holding Company Act (Act 275 of the 1962 Legislature, La. R.S. 6: 1001-1006), adopted by Louisiana pursuant to the express '*Reservation of States' Rights*' contained in the Federal Bank Holding Company Act (12 U.S.C. 1846). Petitioners' contention that the Louisiana Act cannot prohibit the opening of a national bank subsidiary of a holding company was rejected by this Court's dismissal of the

appeal *for want of a substantial federal question* in ***Braeburn Securities Corp.*** v. ***Smith,*** 15 Ill. 2d 55, 153 N.E. 2d 806, appeal dismissed, 359 U.S. 311 (1959); and that contention was also disposed of by the definitions of "*bank*" and "*subsidiary*" contained in the Federal Bank Holding Company Act itself (12 U.S.C. 1841). These definitions of terms, later employed by Congress in 12 U.S.C. 1846, show that Congress intended to reserve to the States the right to regulate and prohibit both national and state bank subsidiaries of holding companies through State holding company legislation. This same conclusion flows directly from the Congressional history supporting the Federal Act, all as set forth in Point II of this brief.

III. For all the reasons set forth in Point III of this brief, there is no merit whatsoever to the contention that this case was not ripe for summary judgment. All parties moved for such relief, and counsel certified to the District Court, as a *condition precedent* to oral argument of those motions, that the facts are undisputed and that the determination of this case should turn *exclusively* on questions of law. The District Court and the Court of Appeals both rendered their decisions on the basis of those motions and stipulations by all parties. Only petitioner Whitney presently seeks to reverse its position, *and this "turnabout" was not even attempted until after the Court of Appeals rendered its decision herein.* The law is settled that this Court will not consider or entertain such baseless and specious contentions advanced for the first time after decision of the Court of Appeals (*Atlas* v. *Eastern Airlines, Inc.*, 311 F. 2d 156, 162, *cert. denied*, 373 U.S. 904 (1963); *Bloeth* v. *New York*, 82 S. Ct. 661, 662 (1962)). And, irrespective of Whit-

ney's present contentions, this case still turns solely on the law, and the law directs that the Comptroller be enjoined from licensing the proposed unlawful operation.

IV. This action *does not* represent a collateral attack on a decision of the Federal Reserve Board, and respondents, confronted with a threatened *illegal licensing* of an *unlawful competition*, clearly had standing to sue.

ARGUMENT

I

The Court of Appeals Correctly Enjoined the Comptroller of the Currency From Licensing, Under 12 U.S.C. § 27, a Proposed Banking Operation Admittedly Conceived, Designed and Proposed Solely for the Purpose of Evading, Defeating and Violating the Prohibitions of the National Bank Act (12 U.S.C. § 36c).

It is settled law that the Comptroller of the Currency has no discretion under the National Bank Act (12 U.S.C. § 27) to issue his Certificate to license a banking operation prohibited by law, and if he attempts to do so, the Courts will enjoin him (*Wayne Oakland Bank* v. *Gidney*, 252 F. 2d 537 (C.C.A. 6, 1958), *cert. denied* 358 U.S. 838; *Camden Trust Company* v. *Gidney*, 301 F. 2d 521, 522 (ftn. 4, 5, D.C. App. 1962), *cert. denied* 369 U.S. 886; *Comercial State Bank* v. *Gidney*, 174 F. Supp. 770, aff'd. 278 F. 2d 871 (D.C. App. 1961)). 12 U.S.C. § 27 itself proscribes the issuance of a Certificate until it can be shown that the banking association involved "is *lawfully* entitled to commence . . . business"; and it expressly provides for the withholding of a Certificate whenever it appears that the shareholders of the proposed banking facilities "*have formed same for any other than the legitimate objects contemplated*" by the National Bank Act.

In the case at bar, both petitioners unequivocally concede that Whitney National Bank of New Orleans is absolutely prohibited by the National Bank Act (12 U.S.C. § 36(c)) and Louisiana law from opening *any* banking offices or facilities outside of Orleans Parish, Louisiana.[14] They likewise concede that the exclusive purpose of the intricate holding company maneuvers and the proposed Jefferson Parish banking operation now before this Court was and is to defeat and evade those prohibitions of the National Bank Act.[15] It is submitted that these concessions, on their face, establish beyond peradventure that the proposed Jefferson Parish operation was expressly created for "*other than the legitimate objects contemplated*" by the National Bank Act, and accordingly, the issuance of a Certificate, which would authorize it to open for business, was necessarily and properly enjoined by the Courts below under the language of 12 U.S.C. §27 itself.

Furthermore, in cases of this nature, the Federal Courts, with this Court in the vanguard, have historically ruled that when corporate forms or devices, including a holding company, are used for the purpose of evading, circumventing or frustrating a statutory prohibition or to defeat public or legislative policy, such devices must be disregarded in order to preserve and uphold the law (*Northern Securities Company* v. *United States*, 193 U.S. 197; *United States* v. *Lehigh Valley R. Co.*, 220 U.S. 257; *United States* v. *Reading Company*, 253 U.S. 26;

[14] In 12 U.S.C. § 36 (f) Congress provided a broad definition for the term "*branch*". It defined "*branch*" to include "any branch bank, branch office, *branch agency, additional office*, or *any branch place of business*".

[15] Whitney petition, pgs. 4, 5; Comptroller's petition, pgs. 3, 4.

Schenley Distillers Corp. v. *United States*, 326 U.S. 432; *Metropolitan Holding Co.* v. *Snyder*, 79 F. 2d 263 (C.C.A. 8, 1935); *Corker* v. *Soper*, 53 F. 2d 190 (C.C.A. 5, 1931), *cert. denied* 285 U.S. 540 (1932); *Alabama Power Company* v. *Federal Power Commission*, 94 F. 2d 601, 618 (D.C. App.); *Francis O. Day, Inc.* v. *Shapiro*, 267 F. 2d 669 (D.C. App.); *Fitzpatrick* v. *Commonwealth Oil Co.*, 285 F. 2d 726, 730 (C.C.A. 5); *Corn Products Refining Company* v. *Benson*, 232 F. 2d 554, 565 (C.C.A. 2)). In *Fletcher Cyclopedia Corporations* (1963 Rev. Ed.), Vol. 1, Ch. 2, § 45, pp. 240, 241, the rule adopted in this case by the Court of Appeals, is stated as follows:

> "Where the corporate form of organization is adopted or a corporate entity is asserted in an endeavor to evade a statute or to modify its intent, courts will disregard the corporation or its entity and look at the substance and reality of the matter."

Thus, while petitioners deceptively seek to contend that this case presents a new, substantial federal question in the banking field upon which the Circuit Courts allegedly are in conflict, *the exact opposite is true.* In fact, since the early 1930's the Circuit Courts have *consistently ruled, in cases involving the banking industry,* that *whenever officers, directors or shareholders of a national bank create a holding company or some other similar corporate device, specifically for the purpose of evading or defeating a provision of the National Bank Act, the holding company must be ignored in order to sustain the law (Metropolitan Holding Co.* v. *Snyder, supra; Corker* v. *Soper, supra,* in which case certiorari was denied by this Court). In the *Metro-*

politan Holding Company case, the Eighth Circuit ruled in 1935, at 79 F. 2d 263, 266, 267:

> ". . . the courts will not countenance the interposition of a mere corporate shadow to conceal who are the actual and beneficial owners of bank shares. To permit individuals to circumvent . . . this statute by simply organizing a corporation for the purpose of holding shares would set up a device against which the statute would ever afterwards be ineffective. . . ."

The decision in *First National Bank of Billings* v. *First Bank Stock Corporation*, 306 F. 2d 937 (C.C.A. 9, 1963), referred to in the petitions herein, is not contrary to the basic rule adopted by the other circuits and applied by the District of Columbia Circuit in the case at bar. Indeed, the Ninth Circuit specifically stated in its opinion in the *Billings* case, at page 942:

> ". . . We do not agree with appellees that the fact that the two banks are separate corporate organizations demonstrates conclusively that one is not a branch of the other. In the banking field, as elsewhere, courts have power to 'pierce the corporate veil' when the realities require it."

In the instant action, no effort whatsoever has been made by petitioners to conceal the fact that both the Comptroller and Whitney knew and intended *from the very beginning* that the whole purpose of the synthetic holding company device and the proposed Jefferson Parish bank was to enable Whitney National Bank of New Orleans to *attempt to evade 12 U.S.C. 36c* and to attempt to open, *with its own funds and under its own management and control*, banking offices at a prohibited location. The President of Whitney-

New Orleans frankly admitted this before the Federal Reserve Board as follows (Comp Ex. 4. J.A. 74):

> "If branch banking were permitted in Jefferson Parish, I wouldn't be here because it would be much simpler to have it by way of a branch. But that is not possible. We see no signs if it coming by legislative action. . . .
>
> "The thing that makes this (the holding company) interesting to us is the ability to approach the branch phase of it."

Petitioners' counsel, of course, have continuously sought to persuade the District Court, the Court of Appeals and now this Court that there are certain differences *in form* between an ordinary branch bank and the proposed Whitney-Jefferson operation. Under the applicable rule of law, however, the Courts are *not* interested *in form;* they are concerned with *realities.* And, before the injunction was granted against the Comptroller in this action, these were the honest '*realities*' of the Whitney proposal, as openly expressed through the words and actions of Whitney-New Orleans and in one instance, by the Comptroller of the Currency himself:

1. "The *basic purpose of the program* is to allow the Whitney organization in New Orleans *to commence a Holding Company operation* controlling a bank in East Jefferson Parish . . ."[16]

2. "Under the holding company approach, the relationship is completely owned by the stockholders of the holding company *who will be all the present stockholders of the Whitney National Bank* . . ."[17]

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[16] J.A. 30, written statement of Whitney-New Orleans to its own stockholders.

[17] J.A. 32, 33, written statement of Whitney-New Orleans to its own stockholders.

3. ". . . common ownership of all of Whitney National Bank of New Orleans stock and all of the stock of a Whitney National Bank in Jefferson Parish by a holding company . . . *is the soundest method of pooling all of the deposits of our customers and of our capital funds for their use and for the development of this community.*"[18]

4. "From the *depositors'* point of view, those in the smaller bank will be assured *of the same management* which directs the larger one without possibility of interruption."[19]

5. "They (the depositors) will be assured of access to the *large loan limits of the combined banks.* They will have the security which arises out of the fact that *the large and small bank have identical ownership as well as management.*"[20]

6. "From the *customer point of view,* there will be no conflict of interest arising out of the manner in which the customer sees fit to divide his business between the *commonly owned banks* in the two parishes. *He will have the full benefits of a relationship with the large bank and its officers.*"[21]

7. "Because of the permanent relationship between the large and the smaller bank, the smaller one can operate safely with a smaller capitalization."[22]

8. The end result of the entire corporate maneuver in the eyes of Whitney, would be as follows:

"The Whitney National Bank of New Orleans will continue in exactly the same form as it is

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[18] J.A. 32, written statement of Whitney-New Orleans to its own stockholders.

[19] J.A. 32, same as notes 14-16. At J.A. 43, Comptroller Saxon, in a sworn statement openly concedes: ". . . . *the same group would be managing both banks* . . ." .

[20] J.A. 32, same as notes 14-16.

[21] J.A. 33, same as notes 14-16.

[22] J.A. 33, same as notes 14-16.

now except for the withdrawal of $650,000. in capital funds which will be put into the Jefferson Parish unit as capital for it."[23]

9. The application for a Certificate of Authority for Whitney-Jefferson was filed with the Comptroller of the Currency, *not* by Whitney Holding, *but* directly by Whitney National Bank of New Orleans, with a covering letter on a Whitney-New Orleans letterhead. In this letter, Whitney-New Orleans stated:[24]

> "These applications form part of an overall plan for the operation in the Parish of Orleans and in the Parish of Jefferson *of the Whitney organization in holding company form.*"

10. Customers of Whitney-New Orleans, when requested by Whitney-New Orleans to support before the Federal agencies the proposed Jefferson Parish operation, openly and uniformly referred to it in writing as a "*branch*" of Whitney-New Orleans.[25]

11. Even the proposed checks, drafts, and stationary for the Jefferson Parish operation were printed so to emphasize in large letters *only* the words "Whitney National Bank".[26]

Clearly, on the basis of this record, the Court of Appeals correctly enjoined the Comptroller of the Currency from licensing this unlawful operation, proposed and designed solely to evade and defeat the prohibitions of Section 36c of the National Bank Act.

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[23] J.A. 68, Testimony of President of Whitney-New Orleans before Federal Reserve Board.

[24] J.A. 380, 381.

[25] J.A. 366-371.

[26] J.A. 125-128.

II

The Lower Courts Likewise Correctly Enjoined the Comptroller From Licensing Under 12 U.S.C. § 27 a Bank Operation Further Directly Prohibited by the Louisiana Bank Holding Company Act, Adopted By Louisiana Pursuant to Rights Expressly Reserved to the States by the Federal Bank Holding Company Act.

The licensing of Whitney's proposed operation in Jefferson Parish was correctly enjoined not only because it constituted a clear-cut attempt to evade and defeat the prohibitions of Section 36c of the National Bank Act, but also because it is *directly* and *expressly prohibited* by Section 3(5) of the Louisiana Bank Holding Company Act (Act 275 of 1962, 2 L.S.A.-R.S.6: 1001-6: 1006 (1962 Supp.)), which, as here pertinent, provides:

> "It shall be unlawful .... (5) for any bank holding company or subsidiary thereof to open for business any bank not now opened for business . . ."

Prior to the instant Whitney proposal, there were *no* known or proposed bank holding company operations in Louisiana. Suddenly, in 1962, Whitney, the largest bank by far in the entire State, threatened to break the dike and release for the first time on the Louisiana banking community the monopolistic flood of holding company operations (J.A. 161-164). Emergency legislation to prevent this was promptly introduced and overwhelmingly passed by the Louisiana Legislature (J.A. 333, 334). On July 10, 1962, this legislation (Act 275 of 1962) was signed into law. As stated above, it prohibited any *Louisiana-incorporated bank holding company*, such as Whitney Holding, or any *subsidiary* thereof, such as petitioner Whitney-Jefferson, from thenceforth opening for business any bank not then already open.

The said Louisiana statute, concededly intended to be directly applicable to petitioner Whitney, was enacted pursuant to the provisions of Section 7 of the Federal Bank Holding Company Act of 1956 (12 U.S.C. § 1846), which provides:

> "*Reservation of rights to States*—The enactment by the Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has *or may hereafter have* with respect to banks, bank holding companies, and subsidiaries thereof." (Italics supplied).

In *Braeburn Securities Corp.* v. *Smith*, 15 Ill. 2d 55, 153 N.E. 2d 806 (1958), *appeal dismissed for want of a substantial federal question*, 359 U.S. 311, Illinois, like Louisiana, passed a very similar State Bank Holding Company Act in 1957, pursuant to the reservation of States' rights contained in 12 U.S.C. § 1846. Braeburn Securities Corporation brought suit in the Illinois courts, *contending precisely as petitioners have done in the case at bar*, that the Illinois statute was (a) unconstitutional and (b) void, insofar as it applied to national bank subsidiaries of bank holding companies. The Illinois Supreme Court upheld the statute as constitutional and *as a proper State regulation of national bank subsidiaries of holding companies within the provisions of 12 U.S.C. § 1846*. Braeburn appealed to this Court, contending in a supporting brief (Docket 718, October, 1958 Term), precisely as petitioners have been doing in the case at bar, that—

> "Ever since *McCulloch* v. *Maryland*, 4 Wheat. 316—jurisdiction over internal affairs of national banks was exclusively in the Federal Government, and any State law which undertook to limit or control such banks is void . . ."

The State Auditor of Illinois thereupon filed a motion to dismiss Braeburn's appeal. *He contended Illinois had the clear right under 12 U.S.C. 1846 to regulate or prohibit bank holding companies whether they attempted to operate through national or state bank subsidiaries.* This Court, in a *per curiam* opinion in 1959, granted the motion to dismiss on the ground that the case failed to present a substantial federal question.[27] Dismissal on that ground, of course, is an action even stronger than judicial affirmance (*Milheim* v. *Moffat Tunnel Improvement Dist.*, 262 U.S. 710, 716, 717 (1923)).

By so ruling in *Braeburn*, this Court simply reaffirmed that national banks, which are instrumentalities of the Federal Government and subject to the paramount authority of the United States, are nevertheless *subject to State laws and prohibitions whenever Congress so provides* (*Mercantile National Bank at Dallas* v. *Langdeau*, 371 U.S. 555, 559 (1963)). For example, Congress long before 1956, specifically made State law "the measuring stick for the establishment of branches by national banks" and application of those State restrictions and prohibitions to national banks has been recognized and upheld by this Court and others in the federal system (*United States* v. *Philadelphia National Bank*, 374 U.S. 321, 328 (1963); *Wayne Oakland Bank* v. *Gidney*, *supra*; *Commercial State Bank* v. *Gidney*, 174 F. Supp. 770, affd. 278 F. 2d 871 (D.C. App. 1960)). In certain other instances, Congress has applied State law as the measure of allow-

[27] See also *Opinion of the Justices of New Hampshire*, 151 A. 2d 236, upholding the proposed New Hampshire Bank Holding Company Act against contentions very similar to those advanced in *Braeburn* and again in the case at bar.

able capitalization of new national banks (48 Stat. 185 (1933), 12 U.S.C. § 51 (1958)). In other instances, it has limited national banks to interest rates on loans prescribed for state banks, a most important area of bank operation (48 Stat. 191 (1933), as amended 12 U.S.C. § 85 (1958)). National banks may be granted trust powers *only* when "not in contravention of State or local law . . ." (76 Stat. 668 (1962), 12 U.S.C.A. § 92a(a) (1962 supp.)). No conversion of a national bank to a state bank, or its merger with a state bank, may take place in "contravention of the law of the State in which the national banking association is located" (64 Stat. 456 (1950), 12 U.S.C. § 214c (1958)). Congress has also specifically reserved to the States broad areas of taxation of national banks (44 Stat. 223-24 (1926), 12 U.S.C. § 548 (1958)), and Congress has "expressly exercised its power to permit national banks to be sued in certain state courts as well as in federal courts" (*Mercantile National Bank* v. *Langdeau, supra,* at page 560).

Moreover, in the Federal Bank Holding Company Act, Congress went to great detail to make it clear that the Reservation of States' Rights contained in Section 7 of the Act applied to *both* national and state bank subsidiaries of holding companies. In 12 U.S.C. 1841(c) it defined the word "*bank*", later employed in 12 U.S.C. 1846, to include "*any national banking association or any State bank . . .*". The word "*subsidiary*", also later employed in 12 U.S.C. 1846, was defined at 12 U.S.C. 1841(d), to include "*any company 25 per centum or more of whose voting shares . . . is owned or controlled by* [a] *bank holding company*". And, finally, the word "*company*" is even defined, at 12 U.S.C. § 1841(b), to mean "*any*

corporation". The sum total of these definitions makes it crystal clear that Congress, in 12 U.S.C. 1846, fully intended to reserve to the States the right to regulate, control and prohibit, if desired, all bank holding company operations within their respective borders, and to prevent, if necessary, the opening, within State borders, of any subsidiary *bank*, state or national, owned or controlled by a bank holding company.

Any remaining doubt in this connection was absolutely dispelled when the Federal Bank Holding Company Act was before the Senate, in 1956, for consideration. The Senate report in support of the bill specifically authorized the States to be "*more severe*", "*more restrictive*" on holding companies and their state or national bank subsidiaries than either the Federal Act or regulation thereunder by the Federal authorities might be (See U.S. Code and Congressional News, 1956, pg. 2493). And, when the manager of the bill, Chairman Robertson of the Senate Banking and Currency Committee, rose to explain the provisions of the legislation on the Senate floor, he specifically adopted a prior position taken by Senator Maybank, and stated with regard to Section 7 of the Act (now 12 U.S.C. 1846) (Cong. Record, 84th Cong. 2d Sess., p. 6752):

> "Now, to me, States' rights means the right of a State to choose its own course of action on a matter within its own jurisdiction, and not have the Federal Government make up its mind for it. This is the positive approach. *A State should have the right to permit or prohibit branch banking, and at the same time, it should have the right to permit or prohibit the operation of bank holding companies within its borders.* Any Federal legislation which forces a State to change its policies

> with respect to either branch banking or holding companies would be an unwarranted interference with States rights . . . .
>
> "Therefore, each State may, within the limits of its proper jurisdictional authority, enact legislation to regulate bank holding companies. Mr. President, as an example of the type of legislation the States may enact, I ask unanimous consent to have printed in the Record the text of a bill recently passed by the Georgia Legislature." (Italics supplied).

The Georgia bill printed in the Congressional Record, at pages 6752, 6753, provided for State control of *both* state and national bank subsidiaries of holding companies.

Also, while the Federal Bank Holding Company Act was before the Senate, Senator Douglas of Illinois offered an amendment, now contained in 12 U.S.C. § 1842(d) and entitled *"Limitation by State Boundaries"*, which prohibited approvals by the Federal authorities of any holding company acquisitions in any State by an "outside" or foreign bank holding company or any subsidiary thereof, *unless the State's statutory laws specifically authorized such acquisitions.* Thus, in the final analysis, the Act contains *two separate provisions* (12 U.S.C. 1842(d) and 1846) whereby Congress authorized the States, including Louisiana, to be as severe and as restrictive as conditions warranted in their further statutory regulation or prohibition of holding company operations and expansions within their respective borders; and Congress left the States free to enforce those prohibitions or regulations irrespective of whether a holding company sought to operate by opening or acquiring a state or national bank subsidiary.

Such was the conclusion which undoubtedly supported this Court's dismissal of the appeal in *Bracburn*. And, this being the case, Louisiana was obviously empowered by the Federal Bank Holding Company Act to prevent and foreclose the initial onslaught of holding company activities in that State by prohibiting Whitney Holding Corporation and its proposed national bank subsidiary from opening for business a bank holding company operation in Jefferson Parish.

It is equally clear, on the authority of this Court's recent decision in *Ferguson* v. *Skrupa*, 372 U.S. 726 (1963), that this, therefore, is a case wherein certiorari should most emphatically be denied. In the words of Mr. Justice Black, at page 731, 732:

> "We conclude that the Kansas Legislature was free to decide for itself that legislation was needed to deal with the business of debt adjusting . . . . We refuse to sit as a "superlegislature to weigh the wisdom of legislation", and we emphatically refuse to go back to the time when courts used the Due Process Clause "to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." Nor are we able or willing to draw lines by calling a law "prohibitory" or "regulatory". Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours. The Kansas . . . statute may be wise or unwise. But relief, if any be needed, lies not with us but with the body constituted to pass laws for the State of Kansas."

In brief, the irrefutable answer to the so-called "basic substantive issue" raised by the petitions herein,[28] is that the proposed opening of Whitney-Jefferson

[28] See Whitney's petition, pg. 9; Comptroller's petition, pg. 11.

in Louisiana is prohibited by *two separate combinations of Federal and State law, i.e.*, irrespective of whether such operation be treated (a) as a proposed "*branch*" of Whitney-New Orleans or (b) as a proposed "*holding company subsidiary*" of Whitney Holding Corporation, or both. The former is precluded by Section 36c of the National Bank Act and Louisiana's branching statutes. The latter is foreclosed by Section 7 of the Federal Bank Holding Company Act and Section 3(5) of the Louisiana Holding Company law. In either case, the Comptroller of the Currency was properly enjoined from licensing an illegal operation—and it is submitted that such rulings, correct on their face as a matter of law, require no review by this Court.

III

All Parties Before This Court Moved for Summary Judgment Herein and Both the District Court and the Court of Appeals, Without Any Objection By Any Party, Rendered Their Decisions on the Basis of an Express Stipulation By Counsel That This Case, Involving Undisputed Facts and Questions of Law Only, Was Ripe for Summary Judgment.

The Comptroller of the Currency was the first party to move for summary judgment in this action. Cross-motions for the same relief were promptly filed by respondents and petitioner Whitney. All parties agreed in their motion papers that "there is no genuine issue herein as to any material fact". When these motions came on before the District Court, Judge McLaughlin stated at the very outset (J.A. 431):

> "The Court will ask counsel on both sides to respond to the question of the Court as to whether there is any substantial question of fact involved in this case, or whether it is *fully agreed* by all

that the question to be presented to the Court is strictly a question of law.

"We all know if there is any substantial question of fact that is a bar to the Court proceeding in a motion for summary judgment."

Petitioner Whitney, which now seeks to contend, *for the first time after decision of the Court of Appeals*, that this case is not ripe for summary judgment, thereupon advised Judge McLaughlin on the record as follows (J.A. 431, 432):

"*Mr. Acheson:* Your Honor, I would say as to that, *there is no disagreement as to the facts between the intervening defendant and the plaintiffs*, if by fact we mean an event, something which occurred and can be reported; if we mean a conclusion which is drawn from that, there are different conclusions. These I submit and we have submitted in papers filed with Your Honor *are mere conclusions of law*, or *conclusions to be drawn from undisputed facts. There are no facts as such which are in dispute.* This is my assertion to Your Honor . . . . I *know of no event, no specific occasion, nothing which was done upon which there is any difference between us.*" (Italics supplied).

The District Court thereupon agreed to hear and determine the motions for summary judgment, and the case was heard and decided by the Court of Appeals, *without objection*, on the same basis. And, of course, while petitioner Whitney presently seeks to contend, for the very first time *after decision of the Court of Appeals*, that summary judgment was improper here, it is interesting to note that the Comptroller of the Currency, in his instant petition, still cannot move himself to join Whitney in this totally implausible position.

As though it were not enough for Whitney so belatedly to exhibit these capacities as a chameleon, it goes further and seeks to support its instant baseless contention *solely* through the device *of attacking the credibility of all of the past written statements and formal testimony of its own organizer, Mr. K. W. Berry, who is still the President of Whitney-New Orleans and who is a banker with 25 years or more experience as the head of the largest bank in Louisiana.* Counsel for Whitney argues that he should be permitted now "to offer evidence to rebut" Mr. Berry's assertions that Whitney-New Orleans planned to operate Whitney-Jefferson "in the same way as if the institutions were one".[29] This surely must be the first time in the memory of this Court that any party sought certiorari on the ground that the Court of Appeals erred by accepting as true and by taking at face value the petitioner's *own* prior written statements and formal testimony, and that a trial was required in order to give that petitioner a chance to rebut its own prior evidence. In any event, as late as April, 1963, this Court denied certiorari in a case where a similar, *although not as bizarre,* contention was advanced (*Atlas* v. *Eastern Airlines, Inc.*, 311 F. 2d 156, 162 (C.C.A. 1, 1962), *cert. denied,* 373 U.S. 904 (1963)) In that case, the First Circuit stated, at page 162:

> "Plaintiff also urges here that the district court erred in granting the motion for summary judgment because the record indicated that the credibility of the affiants . . . was in serious question . . . Be that as it may, counsel for plaintiff did not

[29] See Whitney petition, pg. 23.

> seek to raise this question below, nor did he attempt to cross-examine the affiants in this regard . . . Consequently, he cannot be heard now."[30]

As demonstrated in Points I and II above, this case turns exclusively on questions of law. If Whitney-Jefferson is to be treated as a *branch* of Whitney-New Orleans, it is outlawed by Section 36c of the National Bank Act. If, on the other hand, Whitney-Jefferson is treated solely as a bank holding company subsidiary, it is outlawed by 12 U.S.C. 1846 and Louisiana Act 275 of 1962. There could never be a case more fully suited for summary judgment than this one. And, insofar as the effect of Whitney-New Orleans' "*intent*" in this case is concerned, it was settled in *Metropolitan Holding Co.* v. *Snyder, supra*, at page 268, as follows:

> "The incorporators of the holding company may have acted in good faith according to their standards of right, but under the facts of this case, as disclosed by the record, they must be judged by the *legal effect of what they deliberately did.* If . . . the corporation was merely an instrumentality set up for their own convenience in holding title to the shares, *then in equity it matters not what design, good or evil,* prompted their actions; from either source, the effects of their actions—the avoidance of statutory liability—are the same."

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[30] See also *N.L.R.B.* v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 503 (1951), where this Court stated: "It is not for us to invite review by this Court of decisions turning solely on an evaluation of testimony . . ."; *Bloeth* v. *New York*, 82 S. Ct. 661, 662 (1962), where this Court ruled: "It appears on the face of the present application that the two questions proposed for review were not raised in the Court of Appeals until the . . . motion for reargument. In such circumstances, it is clear that this Court would be without jurisdiction to consider them."

IV

This Action Does Not Represent a Collateral Attack on a Decision of the Federal Reserve Board. Its Sole Purpose is to Enjoin the Comptroller of the Currency From Licensing An Unlawful Operation Under the National Bank Act, Which the Comptroller Alone Is Authorized to Administer.

The complaint in this action seeks no relief, directly, indirectly, or collaterally against the Federal Reserve Board. That Board is not even a party to this action, and it has never sought to intervene or to be represented at any of the proceedings herein, either in the District Court or before the Court of Appeals or in this Court. The injunctive relief granted by the District Court and affirmed by the Court of Appeals does *not* operate to stay or enjoin the Federal Reserve Board in any respect, and it does not operate to reverse, set aside or modify any order or opinion of that Board.

On the contrary, the sole purpose of this suit is to enjoin the Comptroller of the Currency from issuing a license *under the National Bank Act* (12 U.S.C. 27) authorizing an unlawful national banking operation to open for business. This, of course, is not the first time such actions have been brought and sustained by the courts against the Comptroller of the Currency, and in none of these prior cases has it been contended or held that a suit to enjoin the Comptroller constitutes a collateral attack on the Federal Reserve Board (*Wayne Oakland Bank* v. *Gidney*, 252 F. 2d 537 (C.C.A. 6, 1958), *cert. denied* 358 U.S. 830; *Commercial State Bank* v. *Gidney*; 174 F. Supp. 770, aff'd. 278 F. 2d 871 (D.C. App.)).

Petitioners themselves, in spite of their frantic preoccupation with the invention of baseless arguments

for inclusion in their instant petitions, nevertheless were compelled openly to state in those same petitions that the Comptroller of the Currency *alone, not* the Federal Reserve Board, is the *sole officer* charged by Congress with the licensing of national bank operations under the National Bank Act.[31] They admit further in these same petitions that the Federal Reserve Board's sole function, insofar as the Whitney plan was concerned, was to consider the *wholly unrelated matter* of whether Whitney Holding Corporation, the proposed bank holding company, should be permitted *to acquire the stock in Whitney-Jefferson* under a *completely separate and different statute*, to wit, the Federal Bank Holding Company Act (12 U.S.C. 1842).[32] In short, they concede that Congress has charged the Comptroller with administration of the National Bank Act and the Federal Reserve Board with administration of the Holding Company Act. The Comptroller accordingly has no jurisdiction over holding company acquisitions *and the Board has nothing whatsoever to do with the chartering of national banks or branches of national banks under the National Bank Act.*

Indeed, the Federal Reserve Board *itself* was exceedingly careful to make that fact crystal clear when dissenting minority stockholders of Whitney-New Orleans and respondents sought to convince the Board

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[31] The Comptroller's petition, at pg. 11, states: "The permission of the Comptroller of the Currency is necessary under the National Bank Act in order to open a new national bank. 12 U.S.C. 27." Whitney's petition, pg. 6, states: "The Comptroller of the Currency was authorized by law to pass on . . . the formation of a . . . bank in Jefferson Parish (12 U.S.C. 26)."

[32] See Whitney's petition, pg. 6; Comptroller's petition, pgs. 5, 11.

that it should *not* approve the *holding company acquisition phases* of the Whitney program because the entire plan was a mere device to circumvent and defeat Section 36c of the National Bank Act. *The Board refused even to consider the matter, ruling that those objections or charges "relate largely to an alleged violation of the National Bank Act, which is administered by the Comptroller of the Currency, an official of the United States Treasury Department"* (J.A. 168).

In view of the foregoing, it seems unnecessary to deal extensively with petitioners' fallacious contentions that the District Court and the Court of Appeals were powerless to enjoin the Comptroller from licensing under the National Bank Act a patent violation of the law (a) because respondents allegedly did not exhaust their administrative remedies before the Federal Reserve Board *in a totally different, proceeding and under a completely different statute, the Federal Bank Holding Company Act,* or (b) because respondents allegedly had no standing to sue. The short answer to the first argument, of course, is that respondents did exhaust what remedies they had before the Board, but the Board refused, for lack of jurisdiction, even to consider the contention that the Whitney plan was in violation of the National Bank Act (J.A. 168). Respondents thereupon sought judicial review of the Board's decision under 12 U.S.C. 1848. Those proceedings are still pending in the Fifth Circuit, and that Court, after argument and *on its own motion,* stayed further proceedings there until after the final decision in the case at bar. What more could respondents do? The Federal Reserve Board held no *formal statutory hearing* on the application of Whit-

ney Holding Corporation as contemplated by 12 U.S.C. 1842(b), and they have pursued all other remedies afforded by the Holding Company Act.

But irrespective of this, it seems proper to ask simply: Just what does petitioners' contention have to do with the case before this Court? The alleged failure of respondents to exhaust administrative remedies before the Federal Reserve Board in an administrative proceeding under the Federal Bank Holding Company Act is a defense which belongs, *not to petitioners before this Court*, but to the Federal Reserve Board *alone*.[33] *And of course, there were concededly no administrative remedies to exhaust before the Comptroller of the Currency.*[34] He grants or denies certificates under the National Bank Act without holding hearings and without any procedures such as those prescribed by the Administrative Procedure Act, and he is thus wholly precluded from asserting any "failure to exhaust" defense of his own in this action. He is likewise powerless to interpose here a defense which allegedly belongs to some other Federal agency in some other pending law suit. This conclusion is particularly compelling, where the defense sought to be asserted by

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[33] The Federal Reserve Board has indeed raised that very defense in the case pending in the Fifth Circuit, where it will be directly ruled upon. *Thus, instead of respondents collaterally attacking the Federal Reserve Board in this action, the exact opposite is true.* Petitioners are seeking to have this Court pass on issues pending for decision, after argument, in the Fifth Circuit in a case involving other parties and other federal statutes.

[34] See Comptroller's petition, pg. 11, which states: "The latter statute (the National Bank Act) *does not provide for an administrative hearing* . . . and the Comptroller's decisions are made informally, *without an administrative record.*"

the Comptroller would have no merit even if it were asserted by the proper agency.[35]

This brings us to the Comptroller's specious contention that respondent banks lack standing to sue in the case at bar. That argument was effectively disposed of in *Wayne Oakland Bank* v. *Gidney*, 252 F. 2d 537, 544 (C.C.A. 6), *cert. denied* 358 U.S. 830, wherein the Sixth Circuit ruled:

> ". . . The district court found, as a fact, that the competition resulting from the opening and operation of a branch by the National Bank of Detroit would certainly cause inestimable damage to The Wayne Oakland Bank. Whether the rights of a party are infringed by *unlawful action* of an individual or by exertion of unauthorized federal administrative power, it is entitled to have such controversy adjudicated."

Very similar rulings were made in *Wisconsin Bankers Association* v. *Robertson*, 190 F. Supp. 90, *Aff'd.* 294 F. 2d 714 (D.C. App.), *cert. denied* 368 U.S. 938, *rehearing denied* 368 U.S. 979, and in *Commercial State Bank* v. *Gidney, supra.*

Consequently, the Court of Appeals was surely correct when it found in the case at bar that respondents

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[35] It should be fully understood that respondents have not sought to bypass the Congressionally prescribed procedures under the Holding Company Act. On the contrary, respondents have vigorously pursued those procedures under 12 U.S.C. 1848 in the Fifth Circuit. *But, in the meantime, the Comptroller of the Currency knowingly and purposefully sought to frustrate those procedures by licensing and putting the unlawfull operation into business under the National Bank Act before the said procedures could even be commenced in the Fifth Circuit* (J.A. 34, 47, 289). And, of course, once the Comptroller issued the certificate, respondents would have no effective remedy against him for revocation of same (*Commercial State Bank* v. *Gidney*, 174 F. Supp. 770, 778, 779, aff'd. 278 F. 2d 871 (1960)). Hence, the vital necessity of this suit and the injunctive relief granted against the Comptroller.

had standing to protect themselves and their properties against attempted *unlawful competition* and to enjoin the *illegal licensing* by the Comptroller of such operations. In the words of the Court of Appeals:

> "But where, as here, the threatened competition arises from an alleged illegal facility, the appellee state banks have standing to invoke the jurisdiction of a federal court to challenge the alleged unlawful federal administrative action which admittedly would result in irreparable injury to their property rights in their charters."[35]

CONCLUSION

The petitions for writ of certiorari herein should be denied.

Respectfully submitted,

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[35] *Saxon, et ano. v. Bank of New Orleans & Trust Co. et al*, 323 F. 2d 290, 29 (1963).

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Supreme Court of the United States

OCTOBER TERM, 1964

No. 26

WHITNEY NATIONAL BANK IN JEFFERSON PARISH,
Petitioner,

versus

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL.,
Respondents.

No. 30

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY,
Petitioner,

versus

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL.,
Respondents.

BRIEF OF LOUISIANA STATE BANK COMMISSIONER IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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INDEX.

	Page
QUESTION PRESENTED	2
STATEMENT	2
ON THE UNCONTROVERTED FACTS, THE DECISION OF THE COURT OF APPEALS WAS CORRECT	8
1. The National Bank Act	8
2. Louisiana Act 275 of 1962 (L.S.A.-R.S. 6:1001-1006)	14
CONCLUSION	19
APPENDIX A	21

CITATIONS.

Cases:

Alabama Power Company v. McNinch, 94 F.2d 601, 618 (CCA, D.C. [1938])	12
Bank of New Orleans and Trust Company, et al. v. Federal Reserve Board, CCA, 5th, No. 19788	6
Braeburn Securities Corporation v. Smith, 15 Ill.2d 55, 153 NE 2d 806 (1958)	15, 17
Chicago, Milwaukee & St. Paul Ry. Co. v. Minneapolis Civic & Commerce Association, 247 US 490	12
Commercial State Bank of Roseville v. Gidney, 174 F.Supp. 770, Affirmed 278 F.2d 871 (CCA, D.C. [1960])	3

CITATIONS—(Continued):

Page

Cases—(Continued):

Corker v. Soper, 53 F.2d 190 (CCA, 5th) Cert. Denied 285 US 540 12

Corn Products Refining Co. v. Benson, 232 F.2d 554, 565 (CCA, 2nd [1956]) 12

First National Bank in Billings v. First Bank Stock Corporation, 306 F.2d 937 (1962) ..11, 12

Francis O. Day Co. v. Shapiro, 267 F.2d 669 (CCA, D.C. [1959]) 12

Gidney v. Wayne Oakland Bank. 252 F.2d 537, 540 (6th Cir. [1958]) Cert. Denied 358 US 830 (1958) 3

Metropolitan Holding Co. v. Snyder; 79 F.2d 263 (CCA, 8th [1935]) 12

Northern Securities Company v. United States, 193 US 197 12

United States v. Lehigh Valley R. Co., 220 US 257 12

United States v. Philadelphia National Bank, 374 US 321, 83 S.Ct. 1715, 10 L.Ed. 915 ..... 3, 13

United States v. Reading Co., 253 US 26 12

Statutes:

Illinois R.S. C-16-½, §§71-76 (1961) 16

L.S.A.-R.S. 6:54, 328 .....4, 5, 9

L.S.A.-R.S. 6:1001-1006 .....6, 7, 14

12 USC 26, 27 18

12 USC 36 .....3, 5, 8, 9

12 USC 1841 14

12 USC 1848 6

Publications:

United States Code & Congressional News, 1956 18

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

No. 763.

WHITNEY NATIONAL BANK IN JEFFERSON PARISH,
Petitioner,

versus

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL.,
Respondents.

No. 798.

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY,
Petitioner,

versus

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL.,
Respondents.

BRIEF OF LOUISIANA STATE BANK COMMISSIONER IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Respondent, the State Bank Commissioner of Louisiana, respectfully suggests that the opinion and decree

of the United States Court of Appeals for the District of Columbia Circuit, reported at 323 F.2d 270; is correct, and that accordingly the application to review this decision should be denied.

QUESTION PRESENTED.

Whether the Comptroller of the Currency was properly enjoined from his attempt to permit the Whitney National Bank of New Orleans ("Whitney New Orleans"), the largest bank in the State of Louisiana by far, to utilize the device of a holding company created and financed by it for the sole purpose of circumventing and evading limitations imposed by the National Bank Act and the laws of Louisiana on establishment of branch banks.

STATEMENT.

In order to avoid repetition insofar as possible, the State Bank Commissioner of Louisiana adopts the Statement contained in the brief of the Respondent banks, with the following additions necessary to present the position of the State of Louisiana.

The State Bank Commissioner of Louisiana is the officer charged with the responsibility of administering the banking laws of the State, and is vitally interested in the issues involved in this case. The attempt by the Comptroller of the Currency to authorize national banks to circumvent and evade national and state limitations on the location of banking facilities through the medium of holding companies created and financed by them will

necessarily lessen competition and promote monopolistic practices in the banking industry, thereby adversely affecting state chartered banks supervised by this Respondent.

As this Honorable Court has recently had occasion to note, unlike most other countries wherein banking is concentrated in a few hands, commercial banking in this country is essentially a decentralized system of independent banks. *United States v. Philadelphia National Bank*, 374 US 321, 83 S.Ct. 1715, 10 L.Ed. 915. One link in the chain of laws designed to promote competition and preserve a decentralized banking system is §36 of the National Bank Act. This statute guarantees competitive equality between state chartered banks and national banks by providing that national banks are permitted to establish branches or additional banking facilities only when authority to do so is granted to state banks by the statutes of the state. 12 USC 36.[1]

For many years it has been the public policy of the State of Louisiana to preserve competitive equality by prohibiting banks (state or national) from establishing branches beyond the limits of the Parish (County)

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[1] *Commercial State Bank of Roseville v. Gidney*, 174 F.Supp. 770, Affirmed 278 F.2d 871 (CCA D.C. [1960]); *Gidney v. The Wayne Oakland Bank*, 252 F.2d 537, 540 (6th Cir. [1958]), Cert. denied, 358 US 830 (1958), wherein the Court stated:

> "The history of federal legislation regarding branch banking and the statutes applying thereto leave a clear and definite impression that Congress intended, with respect to the location of branches, that a national bank should have no greater rights than it would if it were a state bank, and that a national bank was to be permitted to establish and operate a branch in a State only at such a point as it could, by express provisions of a State statute, establish and operate a branch if it were then a state bank."

wherein their head offices are located. L.S.A.-R.S. 6:54, 328. This policy has served Louisiana well and under it the banking industry in this State has prospered and grown. In fact, Whitney New Orleans, admittedly restricted by the combination of federal and state law from establishing banking facilities beyond the limits of Orleans Parish, has grown to such a position of banking dominance that it possesses approximately 44% of all deposits of individuals, partnerships and corporations in Orleans Parish, and in excess of 30% of all such deposits eminating from the East Bank of the Mississippi River in Jefferson Parish held by all Jefferson Parish banks located in that area.[2]

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[2] Governor Robertson of the Federal Reserve Board, in a dissenting opinion to the decision of the Board approving the application of Whitney Holding Corporation, stated:

"Whitney National Bank of New Orleans is the largest banking institution of the City of New Orleans and the State of Louisiana. It controls in the neighborhood of 40 per cent of the deposit and loan business of all New Orleans banks—more than the second and third largest banks combined. The proposal before the Board of Governors would place control of this bank in Whitney Holding Corporation and thereby would overcome the effect of the branch banking laws of Louisiana, which prevent Whitney from establishing any offices outside of Orleans Parish (the City of New Orleans). In other words, by this means the Whitney banking organization would escape the legal limitations that now permit it to have offices only within the City of New Orleans." (J.A. 109.)

* * * * *

"The proposal before the Board would promote banking convenience in the East Bank section of metropolitan New Orleans to a moderate degree. It would also, however, provide a vehicle for enhancing the existing high degree of banking concentration in the area and would permit a centralization of banking power of major proportions in individual hands, to a degree that, to my knowledge, is without parallel in the American banking system. For these reasons, I conclude that the creation of the proposed holding company system would be contrary to the public interest and therefore should be denied." (J.A. 111.)

Faced with the legal barrier to establishing banking facilities beyond Orleans Parish imposed by the combination of federal and state statutes (12 USC 36; L.S.A.-R.S. 6:54, 328) Whitney New Orleans sought the advice, blessing and guidance of the Comptroller as to how it might circumvent these laws (J. A. 42, 43, 278). With the approval and encouragement of the Comptroller, Whitney New Orleans adopted its so-called "Reorganization Plan", more fully described in the briefs of the Respondent State Banks, admittedly for the sole purpose of circumventing and evading the limitations imposed by the National Bank Act and the Louisiana Statutes on the location of banking facilities.

There were no bank holding company operations in Louisiana until the present case arose; and to Respondent's knowledge, this is the first time that a Comptroller of the Currency has ever attempted to permit a national bank to circumvent that combination of state and federal laws limiting the establishment of branch banks through the device of a holding company financed by the bank.

When it became apparent that the Comptroller proposed to license Whitney banking offices in Jefferson Parish in contravention of L.S.A.-R.S. 6:54 and 12 USC 36, an emergency arose in the banking industry in Louisiana. The State Bank Commissioner immediately requested an opinion from the Louisiana Attorney General as to the legality of the Whitney Plan. The Attorney General ruled that the Whitney Plan violated the State laws prohibiting the establishment of

branches beyond the Parish of the bank's home office (J.A. 163, 164, 289). The Louisiana banks who are Respondents herein brought this suit against the Comptroller to enjoin him from issuing a license which would permit the consummation of the Whitney Plan on the grounds that it violated the National Bank Act. Two of these Louisiana State banks also filed a proceeding in the United States Court of Appeals for the Fifth Circuit, pursuant to §9 of the Bank Holding Company Act of 1956 (12 USC 1848) to review the action of the Board of Governors of the Federal Reserve System in approving that portion of the Whitney Plan falling within its jurisdiction (*Bank of New Orleans and Trust Company et al v. Federal Reserve Board*, CCA 5th, No. 19788).

During the pendency of the instant suit in the Trial Court, and before it was heard on the merits, the Louisiana Legislature, pursuant to the jurisdiction and power reserved to it by the Congress of the United States in the Federal Bank Holding Company Act (12 USC 1846), overwhelmingly passed a State Bank Holding Company Act. (Louisiana Act No. 275 of 1962; L.S.A.-R.S. 6:1001-1006).[3] This statute was enacted into law as emergency legislation to regulate and control State incorporated bank holding companies and their subsidiaries, and to stop the Comptroller and Whitney New Orleans from subverting the public policy of Louisiana and the statutes regulating monopolistic branch banking.

[3] Louisiana Act 275 of 1962 is set forth in its entirety in Appendix A.

§1 of Louisiana Act 275 of 1962 defines the public policy of Louisiana as follows:

> "It is declared to be the policy of this state to protect and to foster the growth of the independent unit bank, an[d] institution whose ownership and origins are grounded in the local community and whose activities are bound up with local economic and social organizations; to prevent the undesirable concentration of control in the banking field to the detriment of the public interest, to insure effective competition among all banking institutions; and, to accomplish these objectives by prohibiting the formation of new banking holding companies and the acquisition of control by whatever means of additional banking institutions by existing bank holding companies and by their subsidiaries." Acts 1962, No. 275, §1.

In addition to prohibiting holding companies from acquiring control of more than 25% of the voting shares of any bank, §3(5) of the Act rendered it unlawful for any bank holding company or subsidiary thereof to open any bank not then opened for business. Because this Act specifically prohibited the Comptroller from successfully permitting the culmination of the Whitney Plan to circumvent §36(c) of the National Bank Act, Petitioners herein promptly amended their pleadings to place the constitutionality of this statute at issue. At that point the State Bank Commissioner intervened as a petitioner to defend the Louisiana Act against this attack and to protect the public policy of the State. The United States District Court for the District of Columbia upheld the Louisiana Act as con-

stitutional; and, accordingly the Court permanently enjoined the Comptroller of the Currency from licensing a banking facility in violation of the statute.

On appeal the United States Court of Appeals for the District of Columbia Circuit affirmed the judgment of the District Court and held that on the undisputed facts the Whitney Plan was simply a corporate device by which Whitney New Orleans might establish banking facilities in Jefferson Parish in violation of 12 USC 36(c). Having found that the Comptroller was precluded by §36(c) of the National Bank Act from licensing banking facilities in Jefferson Parish, the Court found it unnecessary to decide the constitutional questons raised by the Petitioners as to Louisiana Act No. 275.

ON THE UNCONTROVERTED FACTS THE DECISION OF THE COURT OF APPEALS WAS CORRECT.

1. *The National Bank Act.* Throughout this litigation Petitioners have refused to come to grips with the issues involved in this case. Carefully ignoring the uncontroverted facts, Petitioners continue to contend that because the proposed Whitney New Orleans banking facility in Jefferson Parish would be a "separately chartered bank" (Comptroller's Petition, p. 21), it cannot be a prohibited branch of Whitney New Orleans. This position studiously ignores the fact that this case does not involve an attack on the Comptroller's discretion to charter a new national bank in Jefferson Parish. Rather, this case involves an attack on the attempt by the Comptroller to permit a national

bank, the largest in the State, to create and finance a holding company with its own funds as a medium through which to siphon bank funds to establish banking offices in an area prohibited by 12 USC 36 and L.S.A.-R.S. 6:54.

Petitioners concede that Whitney New Orleans is absolutely precluded by a combination of §36 of the National Bank Act and L.S.A.-R.S. 6:54 from establishing branch offices or additional offices in Jefferson Parish. Faced with these federal and state statutory prohibitions, Petitioners nevertheless frankly admit that Whitney New Orleans studied all available means by which it might evade these laws and finally decided to try a "holding company approach" after the Comptroller of the Currency gave his blessing and agreed to approve the merger and issue the bank charters necessary to complete the plan. For his part in consummation of the Whitney Plan the Comptroller: [1] permitted Whitney New Orleans with its own funds to create and finance Whitney Holding Corporation, a Louisiana State chartered business corporation; [2] issued a charter to a so-called "new" New Orleans bank, Crescent City National Bank ("Crescent"), capitalized by Whitney Holding with the funds supplied to it by Whitney New Orleans; [3] approved a consolidation agreement between Whitney New Orleans, Whitney Holding and Crescent, the effect of which was to place the entire outstanding capital stock of Whitney New Orleans in the holding company;[4] and [4] was prepar-

[4] After Whitney New Orleans merged into Crescent, the name of the resulting bank was immediately changed from Crescent City National Bank to Whitney National Bank of New

ing to issue a charter to a national banking association in Jefferson Parish, organized by officers and directors of Whitney New Orleans, with the name Whitney National Bank in Jefferson Parish ("Whitney Jefferson"), the entire $650,000.00 of the capital of which association was supplied by Whitney New Orleans through Whitney Holding. Only this suit precluded the Comptroller from licensing Whitney Jefferson as the last step in consummation of the plan to permit Whitney New Orleans to utilize its funds to establish banking facilities at the prohibited location in Jefferson Parish.

It is simply not a fact, as Petitioners contend, that the decision of the Court of Appeals is a threat to persons with interests in banks who seek to organize new national banks, or that the decision somehow casts doubt upon existing holding companies. There is just no resemblance between a new bank organized by individual investors with their own fresh, new capital, or a bank holding company organized and qualified to invest its capital in bank stocks, and the corporate shenanigans undertaken by Whitney New Orleans with the requisite consent, approval and cooperation of the Comptroller, designed to capitalize a holding company and through it finance wholly owned Whitney banking facilities at a location outlawed by the statutes. It is pertinent, we suggest, to inquire of Petitioners how anyone's rights are threatened, or how doubt is cast

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Orleans. Crescent was described by Governor Robertson of the Federal Reserve Board in his dissenting opinion (J.A. 110) as a "phantom" bank, since it had been chartered for the sole purpose of permitting the largest bank in Louisiana to merge into it; its name was then changed and it dropped out of the picture.

upon the status of existing holding companies or future holding companies organized for a legitimate purpose by a decision which enjoins the Federal Officer charged with administering and enforcing the provisions of the National Bank Act from using his authority to permit a national bank to evade the limitations imposed on national banks by that very Act. It is also pertinent to inquire of the Comptroller what "broad and continuing impact upon the regulation of the banking industry" can possibly result from a decision enjoining the Comptroller from improperly attempting to use his authority to permit a national bank to do indirectly that which the National Bank Act precludes him from permitting the bank to do directly.

Contrary to Petitioners' assertions that because Whitney Jefferson would be clothed with the formalities of a separate bank it could not be considered a branch of Whitney New Orleans, the Ninth Circuit Court of Appeals in the *First National Bank in Billings v. First Bank Stock Corporation*, 306 F.2d 937 (1962) specifically ruled at page 942:

> "We do not agree . . . that the fact that the two banks are separate corporate organizations demonstrates conclusively that one is not a branch of another. In the banking field, as elsewhere, courts have power to 'pierce the corporate veil' when the *realities* require it."

In the instant case by admission of the President of Whitney New Orleans the banks were organized to do business as one and were to operate as "the Whitney

organization in holding company form" (J.A. 380). The Court of Appeals in this case correctly held, consistent with the *Billings* decision and the well established principles repeatedly enunciated by this Honorable Court, that the corporate veil should be pierced when corporate forms are adopted as a means to avoid clear legislative purpose, evade regulatory statutes or defeat public policy.[5]

If the Comptroller's discretion is so broad that he may exercise it free from court inquiry or restraint to permit national banks to adopt and finance new corporate forms solely for the purpose of evading the fundamental legislative purpose underlying §36 of the National Bank Act to preserve competitive equality in the field of establishing additional banking facilities, the dual banking system cannot survive. As stated, prior to embarking on its attempt to commence interparish banking contrary to the laws designed to regu-

[5] *Northern Securities Company v. United States*, 193 US 197; *United States v. Lehigh Valley R. Co.*, 220 US 257; *Chicago, Milwaukee & St. Paul Ry. Co. v. Minneapolis Civic & Commerce Association*, 247 US 490; *United States v. Reading Co.*, 253 US 26; *Alabama Power Company v. McNinch*, 94 F.2d 601, 618 (CCA,D.C. [1938]); *Francis O. Day Co. v. Shapiro*, 267 F.2d 669 (CCA,D.C. [1959]); *Corn Products Refining Co. v. Benson*, 232 F.2d 554, 565 (CAA,2nd [1956]);

See also *Metropolitan Holding Co. v. Snyder*, 79 F.2d 263 (CCA,8th [1935]), holding that stockholders in a national bank may not organize a holding company to which they transfer stock under circumstances indicating that they hope to evade their statutory liability for debts of a national bank under the National Bank Act. This Court stated at page 267, after a review of the Federal cases in the field, that "particularly where a corporation is interposed to defeat or circumvent a statute, the courts have looked beyond [the] corporate entity to ascertain the purposes for which it was organized and the persons identified with that purpose". See also to the same effect *Corker v. Soper*, 53 F.2d 190 (CCA,5th) Cert. Denied 285 US 540.

late monopolistic branching practices, Whitney New Orleans already controlled more than 40% of the banking business available to all New Orleans banks, more than the second and third largest New Orleans banks combined, and more than 30% of the banking business available to all banks with their offices on the East Bank of the Mississippi River in Jefferson Parish. Accordingly, Whitney New Orleans already controls in excess of that portion of the market share of commercial banking in the Orleans-Jefferson Parish area found by this Honorable Court to threaten undue concentration and monopoly.[6] The impact of the physical presence of the Whitney organization in Jefferson Parish on the ability of State banks to successfully compete with the large resources at Whitney's disposal would have disastrous consequences.

Respondent respectfully suggests that the Comptroller of the Currency is the Federal Officer on whom Congress has imposed the duty to enforce its policy of maintaining competitive equality between national and state banks. Respondent further respectfully suggests that when this Federal Officer not only fails to preserve and enforce the Congressional intent expressed in the National Bank Act, but undertakes to use his authority to vitiate this policy, he should be enjoined.

---

[6] In the *United States v. Philadelphia National Bank, supra*, this Court ruled:

> "The merger of appellees will result in a single bank's controlling at least 30% of the commercial banking business in the four-county Philadelphia-Metropolitan area. Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, *we are clear that 30% presents that threat.*" [Emphasis supplied] (83 S.Ct. 1715, p. 1742; 10 L.Ed. 915, p. 945).

2. *Louisiana Act 275 of 1962 (L.S.A.-R.S. 6:1001-1006).* The Court of Appeals having affirmed the District Court on the ground that the opening of Whitney Jefferson is prohibited by §36(c) of the National Bank Act, found it unnecessary to consider whether the "opening is also prohibited by Act 275 of the Louisiana Legislature." The Court of Appeals did, however, rule at page 304 that the actual opening of Whitney Jefferson "would violate the state statute . . .". (Op. p. 304, Footnote 15.) On the other hand, because Act 275 rendered the Whitney Plan so clearly illegal, the District Judge enjoined the Comptroller from issuing a Certificate of Authority in violation of that Act. Respondent, the officer charged with the responsibility of administering and enforcing Act 275, respectfully suggests that the decision of the District Court was also correct.

Congress passed the Federal Bank Holding Company Act (12 USC 1841, et seq.) for the purpose of stringently controlling and regulating bank holding companies in order to stop the growing concentration of banking power. When Congress enacted this statute, it specifically recognized that holding companies could be used to vitiate the policy of the various states, and accordingly reserved to the states the right to enact legislation controlling the operation of bank holding companies within state borders. §7 of the Federal Bank Holding Company Act (12 USC 1846, 70 Stat. 133) provides:

> "RESERVATION OF RIGHTS TO STATES—The enactment by the Congress of this chapter shall

> not be construed as preventing any State from exercising such powers and jurisdiction *which it now has* or *may hereafter have* with respect to banks, bank holding companies, and subsidiaries thereof." [Emphasis supplied.]

Louisiana Act 275 was enacted pursuant to this authority. In the light of this clear reservation of power to Louisiana to regulate state incorporated bank holding companies and their subsidiaries, it is impossible to understand how Petitioners can validly contend, as they did in the Trial Court and in the Court of Appeals, that Act 275 may not constitutionally apply to national banks, even though they are subsidiaries of state incorporated bank holding companies, on the grounds that Congress had preempted the field. Respondent does not contest the proposition that national banks are instrumentalities of the Federal Government and are subject to the paramount authority of the United States. Further, Congress certainly had the power, if it wished to utilize it, to bar the applicability of state law in the field of national bank subsidiaries of state bank holding companies. The fact of the matter is, however, that Congress not only did not bar the applicability of state law, but specifically reserved to the states the right to legislate in the field. If there was ever any doubt about this reservation of states' rights in the field of bank holding companies and their subsidiaries, it was completely eliminated by this Honorable Court when it dismissed for want of a substantial federal question the appeal of the decision of the Illinoi Supreme Court in the case of *Braeburn Securities Corporation v. Smith*, 15

Ill.2d 55, 153 NE2d 806 (1958). In that case Illinois passed a state bank holding company act (Ill. Rev.Stat. C16-1/2, §§71-76 [1961]), a statute very similar in purpose, language and effect to Louisiana Act 275. Braeburn Securities Corporation sued the State Auditor of Illinois in the Illinois courts, contending that the statute was unconstitutional and void insofar as it applied to national bank subsidiaries of a holding company. In rejecting such contentions and upholding the statute as constitutional and a proper state regulation of Illinois' incorporated holding companies and their subsidiaries pursuant to the rights reserved by the Federal Bank Holding Company Act, the court stated at page 808, et seq.:

> "The brief summary of the 1957 Act . . . clearly manifests a legislative determination that future ownership and control of banks in Illinois by bank holding companies must be stopped . . .
>
> "Banking is a business peculiarly affected with a public interest. Local autonomy of banks serving the individual and commercial needs of a community has been . . . the policy of this State since the 1929 amendment to the Illinois Banking Act . . . enacted following the passage by Congress of the McFadden Act which, in effect, permitted the states to determine whether State or national banks operating within a State might maintain branches. Branch banking in Illinois has been prohibited for many years.
>
> "It is clear that this prohibition could be circumvented and indirect branch banking result if, through ownership of bank stock, one or more bank holding companies could control several

banks. Branch banking can be accomplished by one bank operating at several locations or by one company owning and controlling several banks variously located.

"In 1956, Congress adopted legislation regulating bank holding companies (12 U.S.C.A. §1841, et seq.), *and provided, among other things, that its action should not impair the then jurisdiction of the States, and further specifically provided that administration of the Federal Act should be within the confines of State law, if any. The Illinois legislation, as well as legislation in New York, New Jersey, Pennsylvania and Indiana, is an acceptance of the suggestion implied in the Federal Act that the States should act if, as a matter of policy, bank holding company legislation more restrictive than the Federal Act was desired by the States. Further, it seems clear that such State legislation could be applicable to national as well as State banks, since the Congress did not manifest an intent to pre-empt the legislative field.*" [Emphasis supplied.]

The Court further stated at page 811:

"The public policy of Illinois prohibits branch banking, and this Act merely regulates these . . . companies to limit further encroachment on that prohibition."[7]

When the *Braeburn* case reached this Court, the defendant, the State Auditor of Illinois, filed a motion to dismiss for want of a substantial federal question,

[7] The decision of the Supreme Court of New Hampshire in Opinion of the Justices, 151 A2d 236, was to the same effect.

and this Court in a *per curiam* opinion in 1959 (359 US 311) granted the motion.

It is clear beyond cavil from the Senate Report covering the Federal Bank Holding Company Act that §7 was included to specifically reserve to the states jurisdiction over bank holding companies and their subsidiaries. In the United States Code and Congressional News, 1956, at page 2492 the Senate Committee Report states:

> "In any event, another provision of this bill expressly reserves to the States a right to be *more restrictive regarding the formation or operation of bank holding companies* within their respective borders than the Federal authorities can be or are under this bill. *Under such a grant of authority, each State, within the limits of its proper jurisdictional authority, may be more severe on bank holding companies as a class than (1) this bill empowers the Federal authorities to be, or (2) such Federal authorities actually are in their administration of this bill.* In the opinion of the Committee, this provision adequately safeguards States rights as to bank holding companies." [Emphasis supplied.]

Under the National Bank Act (12 USC 26, 27) the Comptroller of the Currency is charged with the duty of determining whether a banking association "is lawfully entitled to commence the business of banking", and may not issue a Certificate of Authority "whenever he has reason to suppose that the shareholders have formed the same for any other than the legitimate

object contemplated by this Chapter". In view of the enactment of Act 275, the fact that §3(5) thereof rendered it unlawful for a banking subsidiary of a bank holding company to open for business, and the Comptroller's clear statutory duty not to authorize a bank to open which was not "lawfully entitled to commence the business of banking", Respondent respectfully suggests that the District Court properly enjoined the Comptroller from carrying out his announced intention of issuing a Certificate of Authority to Whitney Jefferson.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the decision of the Court of Appeals (as well as the decision of the Trial Court) is so clearly correct that the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE.

I HEREBY CERTIFY that a copy of the foregoing brief has been served on the Petitioners, through their attorneys of record, by placing a copy thereof in the United States Mail, postage prepaid, addressed as follows:

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New Orleans, Louisiana, February ....., 1964.

BENTLEY G. BYRNES.

APPENDIX "A"

5. Chapter 12, Title 6, Louisiana Revised Statutes (Codified from Louisiana Act 275 of 1962)

[the section numbers in brackets indicate sections of Act 275 of 1962]:

"An Act

To define the bank holding company, to prohibit the formation of new bank holding companies, and to control the future expansion of existing bank holding companies and of their subsidiaries. [This is the title of the statute as enacted; the title was not codified.]

"[§ 1] § 1001. Declaration of policy.

"It is declared to be the policy of this State to protect and to foster the growth of the independent unit bank, and [sic] institution whose ownership and origins are grounded in the local community and whose activities are bound up with local economic and social organizations; to prevent the undesirable concentration of control in the banking field to the detriment of the public interest; to insure effective competition among all banking institutions; and, to accomplish these objectives by prohibiting the formation of new banking holding companies and the acquisition of control by whatever means of additional banking institutions by existing bank holding companies and by their subsidiaries.

"[§ 2] § 1002. Definitions.

"(A) Bank holding company means any company, foreign or domestic, including a bank,

"(1) which directly or indirectly owns, controls, or holds with power to vote 25 per centum or more of the voting shares of any bank, or

"(2) which controls in any manner the election of a majority of the directors of any bank, or

"(3) for the benefit of whose shareholders or members 25 per centum or more of the voting shares of any bank or a bank holding company is held by trustees; and for the purposes of this Chapter, any successor to any such company shall be deemed to be a bank holding company from the date as of which predecessor company became a bank holding company.

"(B) Notwithstanding the foregoing,

"(1) no company shall be a bank holding company by virtue of its ownership or control of shares acquired by it in connection with its underwriting of securities and which are held only for such period of time as will permit the sale thereof upon a reasonable basis, and

"(2) no company formed for the sole purpose of participating in a proxy solicitation shall be a bank holding company by virtue of its control of voting rights of shares acquired in the course of such solicitation

"(3) nor shall this Chapter apply to shares acquired by a bank holding company which is a bank, or by any banking subsidiary of a bank holding company, in satisfaction of a debt previously contracted in good faith, but such bank holding company or such subsidiaries shall dispose of such shares within a period of two years from the date on which they were acquired or from the date of enactment of this Chapter, whichever is later.

"(4) nor shall this chapter apply to shares which are held or acquired by a bank holding company which is a bank or by any banking subsidiary of a bank holding company, in good faith in a fiduciary capacity; except where such shares are held for the benefit of the shareholders, of such bank holding company or any of its subsidiaries, or to shares which are of the kinds and amounts eligible for investment by National banking associations under provisions of 12 U.S.C.A. § 24, or to shares lawfully acquired and owned prior to the date of enactment of this chapter by a bank which is a bank holding company, or by any of its wholly owned subsidiaries.

"(C) Company means any corporation, business trust, partnership, association, or similiar organization doing business in this State, but shall not include any corporation the majority of the shares of which are owned by the United States or by any State.

"(D) Bank means any commercial bank, savings bank, trust company or similar organization doing business in this State.

"(E) Subsidiary, with respect to a specified bank holding company, means

"(1) any company 25 per centum or more of whose voting shares (excluding shares owned by the United States or by any company wholly owned by the United States) is owned or controlled by such bank holding company; or

"(2) any company the election of a majority of whose directors is controlled in any manner by such bank holding company; or

"(3) any company 25 per centum of more of whose voting shares are held by trustees for the benefit of the shareholders or members of such bank holding company.

"(F) The term "successor" includes any company which acquires directly or indirectly from a bank holding company shares of any bank, when and if the relationship between such company and the bank holding company is such that the transaction effects no substantial change in the control of the bank or beneficial ownership of such shares of such bank.

"[§ 3] § 1003. Prohibitions upon acquisition of bank shares or assets.

"It shall be unlawful:

"(1) for any action to be taken which results in a company or a bank becoming a bank holding company as defined in this Chapter;

"(2) for any bank holding company or subsidiary thereof to acquire direct or indirect ownership or control of any voting shares of any bank if, after such acquisition, such company or subsidiary will directly or indirectly own or control more than 25 per centum of the voting shares of such bank;

"(3) for any bank holding company or subsidiary thereof to acquire all or substantially all of the assets of a bank; or

"(4) for any bank holding company or subsidiary thereof to merge or consolidate with any other bank holding company or any subsidiary thereof;

"(5) for any bank holding company or subsidiary thereof to open for business any bank not now opened for business, whether or not, a charter, permit, license or certificate to open for business has already been issued. Notwithstanding the foregoing, this prohibition shall not apply to additional shares acquired by a bank holding company in a bank in which such bank holding company owned or controlled a majority of the voting shares prior to such acquisition.

"[§ 4] § 1004. Penalties.

"Any bank, bank holding company, company, or any subsidiary of any of them which willfully violates any provision of this Chapter, or any regulation or order issued by the State Bank Commissioner pursuant thereto, shall upon conviction be fined not less than $500 nor

more than $1,000 for each day during which the violation continues. Any individual who willfully participates in a violation of any provision of this Chapter shall upon conviction be fined not less than $1,000 nor more than $5,000 or imprisoned not more than one year, or both.

"[§ 5] § 1005. Administration.

"The State Bank Commissioner shall administer and carry out the provisions of this Chapter and may issue such regulations and orders as may be necessary to discharge this duty and to prevent evasions of the Chapter.

"[§ 6] § 1006. Savings clause.

"Nothing herein contained shall be interpreted or construed as approving any act, action, or conduct which is or has been or may be in violation of any existing law, nor shall anything herein contained constitute a defense to any action, suit or proceeding pending or hereafter instituted on account of any prohibited antitrust or monopolistic act, action, or conduct."

SUPREME COURT, No. [illegible]

Office Supreme Court, U.S.
FILED
MAR 11 1964
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1963

WHITNEY NATIONAL BANK IN JEFFERSON PARISH,
Petitioner,

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL.,
Respondents.

REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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TABLE OF CONTENTS

	Page
Introduction	1
Argument	
I. Respondents Distort the Questions Presented by the Petitions	3
II. The Louisiana Statute Purporting To Forbid the Opening of a National Bank Cannot Provide an Alternative Basis for the Decision of the Court of Appeals	5
Conclusion	13

CITATIONS

Cases:

Braeburn Securities Corp. v. *Smith*, 15 Ill. 2d 55, 153 N.E. 2d 806 (1958), *appeal dismissed*, 359 U.S. 311	10
Cook County National Bank v. *United States*	8
Davis v. *Elmira Savings Bank*, 161 U.S. 275, 283	8
Deatrick v. *Greaney*, 309 U.S. 190, 194	8
Easton v. *Iowa*, 188 U.S. 220	8
Federal Power Commission v. *Southern California Edison Co.*, 32 U.S.L. Week 4169, 4172 (U.S., March 2, 1964)	9
Franklin National Bank v. *New York*, 347 U.S. 373	8
McCulloch v. *Maryland*, 4 Wheat. 316	5, 8
Opinion of the Justices, 102 N.H. 106, 151 A.2d 236 (1959)	11

Statutes:

U.S. Constitution, Article VI, Section 2	5
Federal Bank Holding Company Act, 12 U.S.C. §§ 1841-48	5
12 U.S.C. § 1846	5, 9-11
Louisiana Rev. Stat., 6, § 1003(5)	2, 5-13
National Bank Act, 12 U.S.C. §§ 21-28	7
§ 26	7
§ 36(c)	1, 2, 8

Miscellaneous:

S.Rep. No. 1095, Part 2, 84th Cong., 2d Sess. (1956), page 5	10

Supreme Court of the United States

OCTOBER TERM, 1963

No. 763

WHITNEY NATIONAL BANK IN JEFFERSON PARISH,
Petitioner,

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL.,
Respondents.

REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

INTRODUCTION

The Briefs in Opposition, while arguing the merits at great length, make no serious attempt to deny that the question decided by the Court of Appeals under the National Bank Act, 12 U.S.C. § 36(c), is a question of fundamental and far-reaching importance in the interpretation and administration of the federal banking laws, which has never been but should be decided by this Court. As the Comptroller of the Currency stated in his petition for certiorari (pages 22, 23), "the holding that a separately chartered and incorporated bank may be treated as a branch will have

a broad and continuing impact upon the regulation of the industry and, perforce, the industry itself. . . . The broad implications of the decision, made in apparent disregard of the Congressional scheme, make it important that the issue be definitively resolved by this Court."

This reply brief is necessary because respondents also contend that certiorari should be denied for the reason that the decision of the Court of Appeals can be upheld on a ground not adjudicated by it—that is, that the opening for business of Whitney-Jefferson would have violated a Louisiana statute enacted in 1962, while this case was before the District Court.

Here, too, respondents dwell heavily on the alleged merits of this asserted alternative ground; but they do not and cannot deny that this ground, also, presents a question of far-reaching importance in the interpretation and administration of the federal banking laws which has never (because the Louisiana statute is unprecedented) been decided by this Court.

The manner in which the grounds of decision have alternated in this case is as fascinating as it is baffling. First, the District Court, ignoring the question whether the opening of Whitney-Jefferson would violate 12 U.S.C. § 36(c), decided that it would violate the Louisiana statute. The Court of Appeals, in turn, ignored the Louisiana statute, and held—on a wholly improper assumption of fact in a summary-judgment proceeding—that the opening of the bank would violate 12 U.S.C. § 36(c). Now, when petitioner asks for review of this novel, disruptive and erroneous ruling, respondents raise the Louisiana statute as an alternative ground on which the decision on appeal might have been, but was not, rested.

Petitioner's plea is to get whatever peas there are

out from under the shells, and to procure an authoritative decision for the benefit of the banking authorities and the banking community as to what may lawfully be done in the common and important situation involved here.

ARGUMENT

I

RESPONDENTS DISTORT THE QUESTIONS PRESENTED BY THE PETITIONS

Respondents' contention that this case is similar to others in which courts have "pierced the corporate veil" is wide of the mark. Petitioner demonstrated (1) that separately incorporated national banks are prevented by many provisions of federal law from operating as though they were in substance branches of a single national bank (Petition, pages 9-10, 18-19, 24); (2) that Congress has long recognized that some, though not all, of the advantages of branch banking, where branch banking is illegal, can be obtained through a holding company system, and yet has expressly refused to apply branch-banking restrictions to bank holding companies (Petition, pages 9-10, 13-17); and (3) that the Whitney holding company system is not distinguishable in form, substance, intent or effect from the traditional, well-recognized and congressionally approved bank holding company in operation throughout the United States as a partial alternative to branch banking (Petition, pages 10-15, 19-21).

Whitney's petition also presented for review the question whether the Court of Appeals had not seriously ignored the proper bounds of summary-judgment procedure by deciding the case on the basis of a view of the facts never argued to it or the District Court,

never found by the District Court, and contradicted by sworn material in the record (Petition, pages 20-25). Respondent's argument in reply is that petitioner as well as respondent had moved for summary-judgment and had agreed that the case involved no disputed issues of fact which required a trial. But this is no answer, since the alleged "fact" which the Court of Appeals found controlling—that Whitney-New Orleans "intends to do business through Whitney-Jefferson in the same way as if the institutions were one" [1]—had never been alleged by respondents. No such allegation of fact can be found in the complaint (R. 6-20) nor in respondents' Statement of Facts in support of their motion for summary judgment (R. 275-93).

Thus the agreement by counsel for petitioner that there were no disputed issues of fact in the case could not conceivably justify the Court of Appeals' using summary-judgment procedure once it had decided that the crucial "fact" in the case was one never alleged by respondents. The present case presents a striking illustration of circumstances in which, given the legal standpoint adopted by the Court of Appeals, summary judgment was inappropriate and impermissible. Respondents' argument that petitioner's objection to summary judgment came too late because made only after the decision of the Court of Appeals is absurd, since it was only that decision, and the basis therefor, that presented this issue for the first time. Petitioner did, of course, raise the question to the Court of Appeals in its Petition for Rehearing (pages 10-13), which was denied.

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[1] *Whitney National Bank in Jefferson Parish v. Bank of New Orleans and Trust Co.*, 323 F.2d 290, 303 (D.C. Cir. 1963).

II

THE LOUISIANA STATUTE PURPORTING TO FORBID THE OPENING OF A NATIONAL BANK CANNOT PROVIDE AN ALTERNATIVE BASIS FOR THE DECISION OF THE COURT OF APPEALS

Petitioner's position is that the provision of the Louisiana statute which purports to forbid the opening of a national bank violates the Supremacy Clause of the Constitution of the United States (Article VI, Section 2), and must be stricken under the doctrine of a long line of cases beginning with *McCulloch* v. *Maryland*, 4 Wheat. 316. Respondents' argument is that a provision of the Federal Bank Holding Company Act of 1956, 12 U.S.C. § 1846, has conferred upon or reserved to the states the power to prohibit the opening of national banks chartered by the federal authorities within their boundaries, at least so long as the prohibition is based on reasons connected with the ownership of the stock in the bank by a bank holding company. Petitioner denies that the Federal Bank Holding Company Act had any such intent or effect.

This issue was fully developed and argued both in the District Court and in the Court of Appeals; and it is quite true that the District Court's holding could furnish, if correct, an alternative basis for the result reached by the Court of Appeals. Petitioner would welcome the opportunity to argue this constitutional issue before this Court. Indeed, respondents' injection of this issue into the case furnishes an additional reason why certiorari should be granted. The question is one of considerable importance in the operation of the distinctively American dual banking system and

the proper allocation of power between the states and the Federal Government in the establishment and regulation of national banks. Upon analysis the decision of the District Court must be rejected and the Louisiana statute in question stricken down as an unconstitutional interference with instrumentalities of the Federal Government.

The question presented is simply expressed: whether a state may prohibit a duly constituted and chartered national bank from doing business within the state because of state disapproval of the owners of its stock. If this question is answered in the affirmative, as the District Court answered it, there will be created a serious threat of state interference with the functioning of the national banking system.

The Louisiana statutory provision in question reads as follows:

> "It shall be unlawful:
>
> * * * *
>
> "(5) for any bank holding company or subsidiary thereof [defined as any company 25% of the stock of which is owned by a bank holding company, which in turn is defined as any company which owns 25% of the stock of any bank] to open for business any bank not now opened for business, whether or not, a charter, permit, license or certificate to open for business has already been issued. . . ." 6 Louisiana Rev. Stat. § 1003(5).

A. CONGRESS HAS PRE-EMPTED THE FIELD OF THE CHARTERING AND ESTABLISHMENT OF NATIONAL BANKS

This statute, as applied to national banks, must be assessed in the context of a long history of federal chartering of national banks in order to provide a uniform nationwide banking system not subject to vagaries imposed by the laws of the several states. A series of provisions in the National Bank Act, 12 U.S.C. § 21-28, sets forth a complete and systematic scheme for the establishment and chartering of national banks by a federal official, the Comptroller of the Currency. The act sets forth the purposes for which the Comptroller is authorized to charter new national banks, the matters to be investigated by him and the criteria on which his decision shall be based, and provides that the Comptroller shall issue his certificate authorizing the new bank to open for business when he determines that the bank "has complied with all the provisions of this chapter [the National Bank Act] required to entitle it to engage in the business of banking." 12 U.S.C. § 26.

The statutory pattern laid down in these sections is complete and self-contained. There is no reference to state law, no provision that state officials shall be consulted or even informed that a new national bank is being established within the boundaries of the state, and not the slightest suggestion that state law or state policy is in any way relevant to the Comptroller's right and duty to apply federally established criteria in the establishment of new units as constituent parts of the national banking system.[2] It has been consistently held

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[2] The statutory scheme for the establishment of national banks thus stands in marked contrast to certain other aspects of the

that the provisions just discussed express a congressional intention to pre-empt the field of the establishment and chartering of national banks. *Deutrick* v. *Greaney*, 309 U.S. 190, 194; *Cook County National Bank* v. *United States*, 107 U.S. 445.

The enactment by Louisiana of a statute purporting to forbid the opening of national banks in certain circumstances found undesirable by the state thus creates a plain conflict between state law and federal law. The National Bank Act says that the Comptroller may issue a certificate if he finds that a national banking association has complied with all the provisions of the National Bank Act itself. Louisiana, and the District Court, now say that compliance with the National Bank Act is not enough; the Comptroller may not issue his certificate and the bank may not open unless it has complied with further requirements which may be imposed by the laws of the state where the bank's operations are to be located.

McCulloch v. *Maryland*, 4 Wheat. 316, was the first of a long line of cases holding attempts by states to interfere with the national banking system unconstitutional under the Supremacy Clause. Others are *Davis* v. *Elmira Savings Bank*, 161 U.S. 275, 283; *Easton* v. *Iowa*, 188 U.S. 220, and *Franklin National Bank* v. *New York*, 347 U.S. 373. All these cases struck down state legislation which attempted to regulate the operation of national banks in ways which this Court believed to impair their proper functioning as federal instrumentalities. The state statute presently in ques-

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operation and regulation of national banks which Congress has chosen to make subject to state law. One example is 12 U.S.C. § 36(c), which makes state law relevant to the location of branches of national banks. Other examples are listed in the Brief in Opposition of respondent banks, pages 40-41.

tion goes much farther. It attempts to prevent duly authorized federal officials from creating a national bank pursuant to the provisions of the National Bank Act, and to prevent the bank from doing business. This Louisiana statute, if upheld, would prevent a federal instrumentality—a duly chartered national bank—from existing or operating at all.

B. THE CONGRESSIONAL PRE-EMPTION WAS NOT WITHDRAWN BY THE FEDERAL BANK HOLDING COMPANY ACT OF 1956.

The District Court held, and respondents argue, that the Louisiana statute is saved from unconstitutionality by Section 7 of the Federal Bank Holding Company Act of 1956, which reads in its entirety as follows:

> "The enactment by Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies and subsidiaries thereof." 12 U.S.C. § 1846.

It is clear from the face of the language of this section that it neither increased nor reduced pre-existing state power, but merely expressed Congress's intention not to pre-empt the field of bank holding company regulation by enacting the Federal Bank Holding Act. Any regulation which a state could constitutionally undertake as to bank holding companies and their subsidiaries before the passage of the Act, it could continue to undertake; any action which was previously unconstitutional would remain so.[3]

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[3] *Cf. Federal Power Commission v. Southern California Edison Co.*, 32 U.S.L.Week 4169, 4172 (U.S., March 2, 1964).

Congress went out of its way to make it altogether clear that Section 7 "does not grant any new authority to States over national banks." S. Rep. No. 1095, Part 2, 84th Cong., 2d Sess. (1956), page 5. Thus Congress in advance specifically repudiated the argument that respondents have made throughout this litigation, that § 1846 somehow involves a grant to the states of authority to regulate national banks which they had not theretofore had. Since Section 1846 simply makes it clear that Congress in 1956 wished neither to expand nor restrict the scope of permissible state legislation of national banks, respondents must give some reason *other than* Section 1846 for their contention that the Louisiana statute presently in question is constitutional in spite of the federal pre-emption of the field of the chartering and establishing of national banks. This they have not done and cannot do.

Respondents rely on *Brachburn Securities Corp.* v. *Smith*, 15 Ill. 2d 55, 153 N.E.2d 806 (1958), *appeal dismissed*, 359 U.S. 311, as supporting the position they take here. In that case it was held that the United States Constitution was not violated by an Illinois statute which prohibited any new bank holding company from being organized, or acquiring bank stock, after the effective date of the statute. The Illinois statute contained no provision similar to that at issue here, which prohibits duly constituted and chartered national banks from opening and prevents the Comptroller of the Currency of the United States from authorizing such opening. The Illinois statute constituted bank holding company regulation, which may or may not have been within the scope of the authority reserved to the states by 12 U.S.C. § 1846; it was in no way comparable to the Louisiana statute involved

here.[4] The best proof of this is that if Louisiana had passed the Illinois text, instead of the bill it did enact, Whitney-Jefferson could without question have opened for business and no issue of statutory violation could have been raised in this litigation.

The Louisiana statute is by no means mere bank holding company regulation. Its impact is not on the stockholders of a bank, who may be subject to state jurisdiction, but on a national bank itself, which with respect to all essentials of its creation and operation is *not* subject to state jurisdiction. There are all sorts of ways in which a state may constitutionally affect, regulate, or inhibit bank holding companies, but not *all* such devices are necessarily constitutional. Louisiana cannot merely enact a statute called a bank holding company act and claim that *ipso facto* it must be constitutional because of 12 U.S.C. § 1846. While the ultimate objective of 6 La. Rev. Stat. § 1003(5) may be to prohibit the operations of bank holding companies, Louisiana has adopted an unconstitutional means to achieve this end.

The vice of the means chosen by Louisiana is that an existing national bank, which has met all the qualifications laid down by federal law for opening its doors for business, has been prevented from opening. Since the

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[4] Similar in this respect to the Illinois statute, and wholly dissimilar to the Louisiana statute at issue here, are the Georgia act referred to by Senator Maybank during the debate on the Federal Bank Holding Company Act (R. 409-411), and the New Hampshire bill approved in *Opinion of the Justices*, 102 N.H. 106, 151 A.2d 236 (1959). Respondent banks' contention that the Louisiana statute stands or falls with the Illinois, Georgia and New Hampshire statutes, Brief in Opposition of Respondent Banks, pages 39-43, is thus wholly erroneous.

national bank is a federal instrumentality, chartered to perform federally protected and authorized functions, the operation of the Federal Government itself has been impaired. On analysis, Section 1003(5) is no different in its impact on federal authority than would be a state statute which prohibited the opening, or required the closing, of a national bank if, for example, more than a stated percentage of its stock was held by a religious or a labor organization. Even assuming *arguendo* that the state could validly prohibit such organizations within its boundaries from owning the stock of national banks—itself a dubious proposition—it plainly does not follow that the state could prohibit a national bank from opening for business merely because of the existence of such stock ownership.

The difference between what Louisiana has done and a statute merely regulating stock ownership by bank holding companies is by no means one of form only. If Louisiana had passed a statute forbidding the acquisition of bank stock by bank holding companies, or even one requiring divestiture of prior-acquired stock (which would raise grave but different constitutional questions if applied to stock in national banks), the Comptroller could and would have granted his certificate here, and Whitney-Jefferson could have opened on schedule. Any attempted state regulation of the stock ownership of the bank would be a matter between the state and the bank holding company, a business corporation subject to the jurisdiction of the state. The bank would be open for business; the state's attempt to regulate its ownership would have no effect on its ability to perform the functions for which it was chartered by the Federal Government, and it would be performing those functions today. Thus, the difference between bank holding company regulation and what

Louisiana has done here could not possibly be greater; in the one case, the bank would be in operation, and in the present case it is not.

CONCLUSION

For these reasons as well as for the reasons presented in petitioner's Petition for a Writ of Certiorari and in the Petition for a Writ of Certiorari of James J. Saxon, Comptroller of the Currency, in No. 798, petitioner prays that a writ of certiorari issue.

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March, 1964.

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 798

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY, PETITIONER

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF PETITIONER

In their briefs in opposition, respondents argue that the decision below may be sustained on an alternative ground—that the Comptroller could be enjoined from issuing a certificate to Whitney-Jefferson because its operation would be in violation of a State law prohibiting the operation of bank holding companies. The statutory bases of the respondents' argument are Louisiana Act No. 275 of 1962 (set out at p. 34 of our petition), which makes it unlawful for any bank holding company "to open for business any bank not now open for business," and Section 7 of the Bank Holding Company Act of 1956, which provides that the enactment by Congress of that Act

725-105—64

"shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof." 12 U.S.C. 1846. This contention does not provide a ground for a denial of certiorari in this case for several independent reasons.

A. First, the contention that the Comptroller could not properly issue a certificate to Whitney-Jefferson (and therefore can be enjoined from doing so) because of the prohibitions of State law is, for two reasons, erroneous.

1. The Comptroller of the Currency is charged with certifying that a proposed bank has complied with the provisions of the National Bank Act and is therefore enfitled to operate as a national bank. It is no part of his functions to certify that the proposed bank has complied with all provisions of State law, if indeed such provisions can be applied to national banks at all. The federal banking statutes do, on occasion, direct the Comptroller of the Currency to apply, *as a rule of federal law,* various State statutes such as State prohibitions on the location of branch offices. But it is only those State provisions which are incorporated as matters of federal law that the Comptroller is to consider.[1] His certificate is a certificate

[1] One of the respondents apparently suggests that the National Bank Act itself refers to and incorporates State law (Brief for Louisiana State Bank Commissioner, pp. 18–19). Any such suggestion is untenable, because in context the phrase "lawfully entitled to commence the business of banking" is the equivalent of compliance "with all the provisions" of the National Bank Act "required to entitle it to engage in the business of banking." R.S. §§ 5168, 5169, 12 U.S.C. 26, 27, Pet. pp. 27–28.

of compliance with federal law, and that alone (J.A. 311). There is no provision of federal law which states that a new bank shall not be certified as in compliance with federal law if its opening is prohibited by a State statute.

It is therefore clear that the Comptroller of the Currency is not authorized, much less required, to determine the applicability of State statutes before certifying compliance with federal law and authorizing the national bank to begin operation. To the extent that State statutes could constitutionally be applied to a national bank or its stockholders, they would have to be applied in direct proceedings by State officials against these parties. Indeed, even if the Comptroller were to consider the applicability of a particular State statute, his *ex parte* determination would not be binding on the State courts or on the State enforcement officials. The Louisiana statute itself, as the court of appeals noted, purports to outlaw the opening of a national bank even if the Comptroller of the Currency has already issued the certificate of authority to commence the business of banking. Accordingly, an issue of violation of a State law which is not incorporated in the federal statute cannot form the grounds for an injuction against the Comptroller of the Currency.

2. The Louisiana statute, in any event, cannot constitutionally be applied to prohibit the opening and operation of national banks. National banks are, of course, instrumentalities of the Federal Government (*Mercantile Nat. Bank at Dallas* v. *Landeau*, 371 U.S.

555, 558), created by federal law (the National Bank Act), to serve vital federal purposes. *Franklin National Bank* v. *New York,* 347 U.S. 373, 375. Consonant with the need for a sound, uniform national banking system, the Act confers on national banks all the powers necessary to engage in the business of banking, and sets forth standards of federal law to determine when a national bank has been properly organized, and whether it is entitled to commence the business of banking. R.S. §§ 5136, 5168, and 5169, 12 U.S.C. 24, 26, and 27, Pet. pp. 27–28. State law has no role in this determination. As this Court has said, "The National Bank Act constitutes 'by itself a complete system for the establishment and government of National Banks'." *Deitrick* v. *Greaney,* 309 U.S. 190, 194; *Cook County Nat. Bank* v. *United States,* 107 U.S. 445, 449.

The terms of the National Bank Act must, of course, prevail over any State statute which is in conflict with them, or which interferes with or impairs the ability of national banks to perform their federal duties. *Franklin National Bank* v. *New York,* 347 U.S. 373; *Mercantile Nat. Bank at Dallas* v. *Landeau,* 371 U.S. 555, 558–559. Sec. 3(5) of Louisiana Act 275 of 1962 purports to make it unlawful for any bank owned by a bank holding company "to open for business, whether or not, a charter * * * or certificate * * * has already been issued" permitting it to do so. La. R.S. 6:1003, Pet. p. 34. If applied

to national banks,[2] the State law purports to take away exactly what is granted by the applicable provisions of the National Bank Act (R.S. §§ 5136, 5168, 5169, 12 U.S.C. 24, 26, and 27), namely the authority to commence and engage in the business of banking. Indeed, it would be difficult to conceive of State legislation which more effectively interferes with the ability of national banks to discharge their federel duties than a statute which purports to prevent them from opening their doors. Unless by some subsequent legislation Congress granted the States authority to override the provisions of the National Bank Act, therefore, Sec. 3(5) of the Louisiana Act is in conflict with those provisions, and cannot apply to prevent the opening of a national bank. *Mercantile Nat. Bank at Dallas* v. *Landeau,* 371 U.S. 555, 558–559.

Respondents rely upon Sec. 7 of the Bank Holding Company Act of 1956 (12 U.S.C. 1846) as granting the States such authority. But that section merely provides that the enactment of the 1956 statute should "not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof." The section was intended to preserve existing State authority in regard to State-chartered banks which, like national banks, were subject to the Act. It adds nothing to the powers of the States over national

[2] Although the Louisiana Act does not in terms apply to national banks, the context in which it was passed supports the view that it was intended to apply to them. The Act would be consonant with federal law if read narrowly to apply only to State banks.

banks; it merely negates any inference of preemption in the regulation of State-chartered banks that might otherwise arise from "the enactment by the Congress of this chapter * * *." The legislative history of Section 7 makes this absolutely clear. The Senate Report (Sen. Rept. 1095, Part 2, 84th Cong., 2d Sess., p. 5; 102 Cong. Rec. 6758 states:

> In order to clarify the legislative history of section 7, the committee wishes to emphasize that this section does not grant any new authority to States over national banks. The purpose of the section is to preserve to the States those powers which they now have in our dual banking system.[3] * * *

It is thus clear that Section 7 of the Bank Holding Company Act of 1956 does not grant the States a power they previously lacked—the power to prohibit the opening of a national bank. This Court's dismissal for want of a substantial federal question of the appeal in *Braeburn Securities Corp.* v. *Smith*, 15 Ill. 2d 55, 153 N.E. 2d 806, is not a holding to the contrary. Unlike Sec. 3(5) of Louisiana Act 275 of 1962, the State statute involved in that case contained no provision prohibiting a national bank owned by a bank holding company from opening for business and the appellant, accordingly, asserted no conflict between the State statute and the National Bank Act (which he did not even cite). The Illinois case thus did not present the issue of conflict between State law and the National Bank Act which is at the heart of the present case.

[3] See also, Sen. Rept. 1095, Part 1, 84th Cong., 1st Sess., pp. 10-11.

B. Respondents' contentions based upon Louisiana Act 275 of 1962 do *not* provide an alternative basis for sustaining the judgment of the court of appeals without reaching the first question presented by our petition for certiorari. We there stated (Pet. 12):

> * * * The jurisdictional question presented by this case is whether competitor banks must raise, in the established administrative proceedings before the Federal Reserve Board, all objections to the transaction upon which the Board is authorized to pass or may attack the transaction, after the Comptroller has recommended its approval and the Board has approved it, by a suit for an injunction brought against the Comptroller of the Currency. It is our contention that persons opposing the acquisition and operation of the new subsidiary must present to the Federal Reserve Board objections which can be raised before that agency, and that they are bound by its decision subject only to review in the reviewing court of appeals.

The nature of respondents' contention in the present case supports our position in this regard. A suit against the Comptroller is not the proper forum for determining the applicability and effect of State law under the Bank Holding Company Act of 1956. It is apparent that the question whether the Bank Holding Company Act of 1956 authorizes States to prohibit a bank holding company from opening a national bank subsidiary should be resolved before the forum (the Federal Reserve Board) and by the procedure specified by that Act, and should be reviewed in a judicial proceeding in which the Board is a party—

not in a collateral proceeding against the Comptroller of the Currency.*

C. There are, finally, two additional reasons why the respondents' reliance upon State law as an alternative ground for affirmance does not affect the importance of Supreme Court review in this case.

1. The decision of the court below is bottomed on federal statutory grounds which are applicable to the acquisition and operation of national banks by holding companies in every State; the impact of the decision will not be limited to States where a State statute, such as that of Louisiana, prohibits the opening of national banks by holding companies. Since, as we have pointed out in our petition, suits for an injunction against the Comptroller of the Currency and proceedings for direct review of Federal Reserve Board decisions under the Bank Holding Company Act may always be brought in the District of Columbia Circuit, the decision below, unless reversed, will remain a precedent which controls an important aspect of banking operations throughout the country. For this reason, it is of substantial importance to the banking industry and its regulatory agencies that the grounds of the court's decision be reviewed by this Court.

2. Although the alternative ground of State law set forth by the respondents is of less general application than the federal statutory ground on which the decision below is based, the questions as to the ap-

* This is, of course, in no way affected by the fact that Louisiana did not pass the statute on which respondents rely until after the Federal Reserve Board had approved the Whitney program.

plicability of State law are, if reached by this Court, themselves worthy of review. As we have pointed out above, we do not believe that a State may constitutionally prohibit the opening and operation of a national bank. There is, moreover, grave doubt as to the extent to which States may control the ownership of the stock of national banks by holding companies.

CONCLUSION

For the reasons set forth above, and in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.[*]

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MARCH 1964.

[*] In this Court respondents have sought to raise, for the first time, antitrust considerations of undue concentration of banking power and monopoly (Brief for Louisiana State Bank Commissioner, p. 13; see Brief for Respondent Banks, p. 5). The proposal approved by the Federal Reserve Board did not involve a merger with, or acquisition of, a competing banking institution. Accordingly, as the Board found, the Whitney proposal would not increase the concentration of New Orleans banking business in Whitney banks (J.A. 104–105). Indeed, that proposal is wholly consonant with the Congressional policy of fostering growth through internally generated expansion, rather than by acquisition of existing institutions. *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 370. The Antitrust Division of the Department of Justice did not oppose the Whitney proposal before the Federal Reserve Board (as is its practice when it believes there is a serious question of possible antitrust violations), and the Board itself found that approval of the plan would tend to strengthen banking competition (J.A. 102, 105–106).

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER WHITNEY NATIONAL BANK IN JEFFERSON PARISH

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AUGUST 25, 1964.

TABLE OF CONTENTS

	Page
Jurisdiction	2
Opinions Below	2
Questions Presented	3
Statutes Involved	4
Statement	4
The Whitney Program	5
Administrative Proceedings and Approvals	7
Proceedings in the Lower Courts	8
The Fifth Circuit Action	11
Summary of Argument	11
Argument:	
I. Whitney National Bank in Jefferson Parish Is Not a "Branch" of Whitney National Bank of New Orleans Within the Meaning of 12 U.S.C. § 36(c)	19
A. Congress Has Deliberately Chosen Not To Subject Bank Holding Companies to the Legal Restrictions on Locations of Branches of National Banks	20
1. The Banking Act of 1933	21
2. The Federal Bank Holding Company Act of 1956	23
B. The Court of Appeals' Determination That Whitney-Jefferson Would "to All Intents and Purposes" Be a Branch in Evasion of the Law Was Unfounded	27
II. A State Statute Purporting To Prohibit a National Bank from Doing Business in That State Is Unconstitutional	41
A. Congress Has Preempted the Field of the Organization and Chartering of National Banks	41
B. The Congressional Preemption Was Not Withdrawn by Section 7 of the Federal Bank Holding Company Act of 1956	46
C. The Louisiana Statute Violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment	52

Page

Conclusion 57
Appendix A: Statutes Involved 58
Appendix B: Illustrative Comments of Regulatory Agencies and Scholars on the Development and Role of Bank Holding Companies 76

TABLE OF CITATIONS

Cases:

American Surety Co. v. *Baldwin*, 90 F. 2d 708 (7th Cir. 1937) 45
American Surety Co. v. *First Nat'l Bank*, 141 F. 2d 411 (4th Cir. 1944) 45
Arkadelphia Co. v. *St. Louis S.W. Ry.*, 249 U.S. 134 55
Bank of New Orleans v. *Board of Governors of the Federal Reserve System*, 5th Cir., No. 19,788 11
Bracburn Securities Corp. v. *Smith*, 15 Ill. 2d 55, 153 N.E. 2d 806 (1958), *appeal dismissed*, 359 U.S. 311 ..... 48, 49
Brust v. *First Nat'l Bank*, 184 Wis. 15, 198 N.W. 749 (1924) 45
Bush v. *Orleans Parish School Board*, 188 F. Supp. 916 (E.D. La. 1960), *aff'd per curiam*, 365 U.S. 569 54
Bush v. *Orleans School Board*, 191 F. Supp. 871 (E.D. La. 1961), *aff'd per curiam*, 367 U.S. 908 54
Camden Trust Co. v. *Gidney*, 112 U.S. App. D.C. 197, 301 F. 2d 521 (1962), *cert. denied*, 369 U.S. 886 ..... 19, 34-35
Cook County Nat'l Bank v. *United States*, 197 U.S. 445 ..14, 43-44
Cooper v. *O'Connor*, 70 U.S. App. D.C. 238, 105 F. 2d 761 (1939) 45
Cotting v. *Kansas City Stock Yards Co.*, 183 U.S. 79 54
Davis v. *Elmira Savings Bank*, 161 U.S. 275 45
Deitrick v. *Greaney*, 309 U.S. 190 ..... 43, 48
Dinan v. *First Nat'l Bank*, 117 F.2d 459 (6th Cir. 1941), *cert. dismissed*, 315 U.S. 824 45
Easton v. *Iowa*, 188 U.S. 220 45
Eccles, v. *Peoples Bank of Lakewood Village*, 333 U.S. 426 .. 33
Equitable Life Assurance Society v. *Moore*, 29 F. Supp. 179 (E.D. Ill. 1939) 49
Federal Power Commission v. *Southern California Co.*, 376 U.S. 205 47
First Nat'l Bank v. *California*, 262 U.S. 366 45

Cases—Continued

	Page
First Nat'l Bank v. *Missouri*, 263 U.S. 640	17
First Nat'l Bank in Billings v. *First Bank Stock Corp.*, 306 F. 2d 937 (9th Cir. 1962)	30, 34-35, 38
Fountain v. *Filson*, 336 U.S. 681	33
Franklin National Bank v. *New York*, 347 U.S. 373	45
Gomillion v. *Lightfoot*, 364 U.S. 339	15, 54
Griffin v. *School Board of Prince Edward County*, 377 U.S. 218	15, 54
Kennedy v. *Silas Mason Co.*, 334 U.S. 249	33
McClellan v. *Merchants' and Miners' Nat'l Bank*, 77 Colo. 302, 236 Pac. 774 (1925)	48
McCulloch v. *Maryland*, 4 Wheat. 316	41
McFarland v. *American Sugar Refining Co.*, 241 U.S. 79	54
Mercantile National Bank at Dallas v. *Langdeau*, 371 U.S. 555	45
Morey v. *Doud*, 354 U.S. 457	54
Nat'l Bank v. *Commonwealth*, 9 Wall. 353, 362	45
Opinion of the Justices, 102 N.H. 106, 151 A. 2d 236 (1959)	48
Poller v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464	33
Sartor v. *Arkansas Natural Gas Corp.*, 321 U.S. 620	33
Scott v. *Pequonnock Nat'l Bank*, 15 Fed. 494 (S.D. N.Y. 1883)	48-49
Starr v. *O'Connor*, 118 F. 2d 548 (6th Cir. 1941)	45
Yakus v. *United States*, 321 U.S. 414	55

Statutes and Regulations:

Constitution of the United States:	
Article VI, Clause 2 (Appendix A, p. 58)	41
Amendment XIV, Section 1 (Appendix A, p. 58)	52, 55
Banking Act of 1933, c. 89, 48 Stat. 162	12, 21
§ 5(c)	22
§ 19	22
§ 23	17
§ 27	22

Statutes and Regulations—Continued

	Page
Federal Bank Holding Company Act of 1956, c. 240, 70 Stat. 133, as amended	
12 U.S.C. §§ 1841-1848 (Appendix A, pp. 66-71)	6, 7, 23
§ 1842(c)	26
§ 1843(a)(2)	38
§ 1845(a)	29
§ 1846	15, 46, 47, 51
§ 1848	11
Federal Reserve Act, Act of December 13, 1913, c. 6, 38 Stat. 251, as amended	
12 U.S.C. § 221(a)	22
§ 334	22
§ 481	22
§§ 601-604	23
28 U.S.C. § 1254(1)	2
Title 6, Louisiana Revised Statutes	
§ 54	4
§ 328	4
§§ 1001-1006 (Act 275 of 1962) (Appendix A, pp. 72-75)	
§ 1003(5) (Appendix A, p. 74)	9, 14, 15, 41, 48-54
McFadden Act, c. 191, 44 Stat. 1224 (1927)	16
National Bank Act, Act of June 3, 1864, c. 106, 13 Stat. 99, as amended	
12 U.S.C. §§ 21-28	14, 41-42
§ 21 (Appendix A, p. 59)	
§ 22 (Appendix A, p. 59)	39, 42
§ 23 (Appendix A, p. 59)	
§ 24 (Appendix A, p. 59)	42
§ 26 (Appendix A, p. 59)	7, 42
§ 27 (Appendix A, p. 60)	7, 8, 42
§ 36(c) (Appendix A, pp. 60-61)	2, 3, 9, 11, 12, 16, 17, 21-23, 26
§ 36(f) (Appendix A, p. 61)	22
§ 52	48
§ 56	36
§ 61 (Appendix A, pp. 61-63)	22, 31

Statutes and Regulations—Continued

	Page
§ 82 (Appendix A, p. 65)	29
§ 84 (Appendix A, p. 65)	30
§ 91	28
§ 93 (Appendix A, p. 65)	29, 30
§ 161	22
§§ 191-200	29
§ 215	7

Miscellaneous:

Bell, "National Bank Branches—The Authority To Approve and To Challenge," 19 Bus. Law. 887 (1964)	35
"Branch, Chain, and Group Banking," in Board of Governors of the Federal Reserve System, "Banking Studies" (1941)	16
Cartinhour, "Branch, Group, and Chain Banking" (1931) (Appendix B, pp. 77-78)	
Chapman, "Concentration of Banking" (1934) (Appendix B, p. 78)	
Chapman & Westerfield, "Branch Banking" (1942) (Appendix B, p. 78)	
Fed. Reserve Bd. Ann. Rep. (1921) (Appendix B, p. 76)	
Fed. Reserve Bd. Ann. Rep. (1927) (Appendix B, p. 76)	
1964 Fed. Reserve Bull.	18
Fischer, "Bank Holding Companies" (1961) (Appendix B, p. 79)	
Fordham, "Branch Banks as Separate Entities," 31 Colum. L. Rev. 975 (1931) (Appendix B, p. 78)	17
Lamb, "Group Banking" (1961) (Appendix B, pp. 78-79)	20, 38-39
Michie, "Banks & Banking" (1944)	45
Nadler & Bogen, "The Bank Holding Company" (1959) (Appendix B, p. 79)	
New Orleans States-Item,	
June 28, 1962	53
July 5, 1962	53
New Orleans Times-Picayune,	
Dec. 20, 1961	7
June 28, 1962	53
July 5, 1962	53
Willit, "Chain, Group, and Branch Banking" (1930) (Appendix B, pp. 76-77)	

Supreme Court of the United States

OCTOBER TERM, 1964

No. 26 and No. 30

WHITNEY NATIONAL BANK IN JEFFERSON PARISH,
Petitioner,

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL.,
Respondents.

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY,
Petitioner,

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL.,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER WHITNEY NATIONAL BANK IN JEFFERSON PARISH

These cases are before the Court on writs of certiorari (376 U.S. 948) to review a judgment of the United States Court of Appeals for the District of Columbia Circuit entered on August 14, 1963. That court (Miller, J., joined by Washington and Danaher,

JJ.) held that petitioner Whitney National Bank in Jefferson Parish (hereafter "Whitney-Jefferson"), a chartered national bank, was in reality a "branch" of another national bank, and was therefore prohibited from doing a banking business because of the restrictions on the locations of branches of national banks contained in the National Bank Act, 12 U.S.C. § 36(c). The Court of Appeals affirmed a judgment of the United States District Court for the District of Columbia which, on different grounds from those relied on by the Court of Appeals, had granted a declaratory judgment and a permanent injunction against Whitney-Jefferson and the Comptroller of the Currency, petitioners here, forbidding the opening for business of Whitney-Jefferson.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on August 14, 1963 (R. 478).[1] Timely petitions for rehearing *en banc* were denied on October 17, 1963, Judges Wright and McGowan not participating (R. 479). On March 23, 1964, this Court granted timely petitions for certiorari filed by Whitney-Jefferson and the Comptroller, and consolidated the cases for oral argument (R. 481). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Miller, J.) appears at R. 454 and is reported at 116 U.S. App. D.C.

[1] Record citations herein ("R. ") are to the Transcript of Record in this Court.

285, 323 F.2d 290. The opinion of Judge McLaughlin of the United States District Court for the District of Columbia is printed at R. 444 and is reported at 211 F. Supp. 576, *sub nom. Bank of New Orleans and Trust Co. v. Saxon.*

QUESTIONS PRESENTED

1. Can a national bank which is a bank holding company subsidiary, organized in accordance with the provisions of the National Bank Act and complying with all other federal statutes and regulations, be held to be a "branch" of another separately chartered national bank within the meaning of 12 U.S.C. § 36(c)? In any event, can such a holding properly be based on a factual determination made in the first instance by a court of appeals, on review of a summary judgment based on other grounds, and in the face of contrary sworn material in the record?
2. Is a state statute which purports to prevent the opening of a duly organized national bank, on the ground of state disapproval of the ownership of its stock, in conflict with the National Bank Act and an unconstitutional interference with the operation of the national banking system; and is such a statute arbitrary, discriminatory and confiscatory in violation of the Fourteenth Amendment?
3. May a decision of the Federal Reserve Board, which approved a plan for the operation of a new national bank by a bank holding company pursuant to the Federal Bank Holding Company Act of 1956, be collaterally attacked by

competitor banks in a suit to enjoin the Comptroller of the Currency from authorizing the opening of the new bank? (This question is fully treated in the brief for petitioner Saxon, and petitioner Whitney-Jefferson adopts the arguments made in that brief.)

STATUTES INVOLVED

Article VI, Clause 2, of the Constitution of the United States, the equal protection and due process clauses of the Fourteenth Amendment to the Constitution, the pertinent provisions of the federal banking laws (12 U.S.C. §§ 21-24, 26, 27, 36(c), 36(f), 61, 82, 84, 93, 1841-48), and Louisiana Act 275 of 1962 (6 La. Rev. Stat. §§ 1001-06) are set forth in Appendix A to this brief (pages 58-76).[2]

STATEMENT

Whitney National Bank of New Orleans (hereafter "Whitney-New Orleans") is a national bank located in the City of New Orleans, which is coextensive with the Parish (county) of Orleans. As a national bank, Whitney-New Orleans is prevented from establishing branches outside Orleans Parish by 12 U.S.C. § 36 (c), which provides that national banks may establish branches only within the geographic limits imposed by state law on state banks.[3]

As the New Orleans metropolitan area has expanded,

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[2] Complete statutory citations of these provisions are found in Appendix A and will therefore not be repeated when these provisions are referred to in the text.

[3] State banks in New Orleans with capital of more than $100,000 are prohibited by 6 La. Rev. Stat. §§ 54 and 328 from establishing branches outside Orleans Parish.

Whitney-New Orleans and its urban competitors have found themselves greatly handicapped in being forbidden to follow their customers into that part of the metropolitan area which falls outside the limits of the central city. In particular, Jefferson Parish, adjacent to Orleans Parish, is a rapidly developing part of the New Orleans metropolitan area (R. 100-01). Many residents of Jefferson Parish find it inconvenient to maintain their relations with downtown banks which are precluded from establishing branches in their neighborhoods.

The Whitney Program

Like other downtown banks all over the country faced with the same problem (R. 100), the New Orleans banks have sought means for establishing banking connections in the suburbs, including Jefferson Parish, consistently with the prohibition on branches. Two of Whitney-New Orleans' three principal competitors have solved this problem by establishing "affiliate" or "satellite" banks in Jefferson Parish. The management of Whitney-New Orleans' largest competitor, the National Bank of Commerce of New Orleans, in 1955 induced a majority of its stockholders to organize, as majority owners, a new bank under the name of the National Bank of Commerce in Jefferson Parish (R. 42, 49-58, 116-17). This bank now has five offices in Jefferson Parish. In order to meet the competitive advantage which other downtown banks thus obtained, Whitney-New Orleans determined that it, too, should establish a relationship with a bank in Jefferson Parish.

Accordingly, Whitney also developed a program for the creation of a new national bank in Jefferson Parish. It would be a separate corporation, but through the vehicle of a holding company established pursuant to the

Federal Bank Holding Company Act of 1956, 12 U.S.C. §§ 1841-48, it would be under the same ultimate ownership as Whitney-New Orleans. Accordingly, the stockholders of Whitney-New Orleans adopted a plan of reorganization which would result in ownership of the stock of Whitney-New Orleans by Whitney Holding Corporation (Whitney Holding) and ownership of the stock of Whitney Holding *pro rata* by the former stockholders of Whitney-New Orleans.[4] Whitney-New Orleans would continue to conduct a banking business limited to Orleans Parish. Whitney-New Orleans would pay to Whitney Holding, out of its undivided profits available for dividends, a dividend of $650,000.[5] Whitney Holding would use these funds to establish, as a new wholly owned subsidiary, Whitney National Bank in Jefferson Parish (hereafter "Whitney-Jefferson"), which would then conduct a new banking business limited to Jefferson Parish. It was, of course, contemplated that—like its competitors' Jefferson affiliates—Whitney-Jefferson would rely substantially

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[4] The precise corporate steps by which this was accomplished are set out at R. 43-47 and in the District Court's findings, R. 446-47. The Court of Appeals appeared to be somehow troubled by the alleged complexity of these steps, but the extent to which the implementation of the program involved "simple" or "complex" corporate steps is not relevant to any question presented here.

[5] These funds were not part of the "capital" of Whitney-New Orleans, as respondents have repeatedly asserted without foundation. Rather, they represented funds available for dividends, which the stockholders could direct be paid to them as such or be used for any other legal purpose which they chose. See pages 36-38, *infra*.

The initial capital structure of Whitney-Jefferson consists of $500,000 capital, $100,000 surplus, and $50,000 undivided profits (R. 46, 114, 389).

on the management experience which over the years had inspired the confidence of Whitney-New Orleans' customers.

Administrative Proceedings and Approvals

Approval of two federal agencies was necessary before the Whitney program could be put into effect. The Comptroller of the Currency had authority to pass on the reorganization of Whitney-New Orleans and the formation of a new national bank in Jefferson Parish.[6] The Federal Reserve Board had jurisdiction to pass on the use of funds of Whitney Holding to create Whitney-Jefferson and on the acquisition of the stock of that bank by Whitney Holding.[7]

Accordingly Whitney-New Orleans, by detailed applications filed in June and July 1961, submitted its program to Ray M. Gidney, then the Comptroller of the Currency, and to the Federal Reserve Board.[8] On October 3, 1961, after four months' investigation Mr. Gidney approved the reorganization of Whitney-New Orleans and the creation of Whitney-Jefferson, all subject to the approval of the Federal Reserve Board (R. 44). On May 3, 1962, after a public hearing at which interested parties were invited to appear,[9] the Board approved, as in the public interest, the formation of

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[6] 12 U.S.C. §§ 26-27; Act of Sept. 8, 1959, § 20, 73 Stat. 460, 12 U.S.C. § 215 (1958), as amended, 12 U.S.C. § 215 (Supp. V, 1959-63).

[7] 12 U.S.C. §§ 1841-48.

[8] Notice of the filing of the application to the Board was published in the Federal Register on July 28, 1961 (R. 98).

[9] Notice of the hearing was published in the *Federal Register* on December 23, 1961, and in the New Orleans newspapers (*e.g.*, New Orleans Times-Picayune, December 20, 1961, § 3, p. 24, col. 1). The public hearing was held on January 17, 1962 (R. 98).

Whitney Holding and its acquisition of the two proposed banking subsidiaries (R. 96). None of the present respondents appeared or registered any objection to the Whitney program (R. 61).

On May 10, 1962, Whitney-Jefferson executed and delivered to the new Comptroller of the Currency[10] its articles of association and its certificate of organization, thereby establishing its corporate existence as a national banking association in accordance with 12 U.S.C. § 24. (See R. 392-94.) On May 18, 1962, the Comptroller approved the final corporate formalities necessary to complete the program (R. 34, 46). On May 24, 1962, the duly elected and qualified directors of Whitney-Jefferson adopted by-laws and took action by which the new bank became a member of the Federal Reserve System (R. 46, 390).

Thereafter, the sole remaining legal step necessary to permit the opening of Whitney-Jefferson for business was the issuance to it by the Comptroller, under 12 U.S.C. § 27, of a certificate authorizing it to commence the business of banking. The Comptroller was about to issue such a certificate when this action was commenced on June 9, 1962 (R. 6, 16, 47). Whitney-Jefferson was prepared to open its doors for business, and would have commenced operations virtually as soon as it received a certificate (R. 16, 27, 47, 115-31, 181-84, 329, 390-91).

Proceedings in the Lower Courts

The original plaintiffs in this action, three Louisiana state banks, claimed that they would lose business if Whitney-Jefferson were allowed to open (R. 16-19,

[10] James J. Saxon succeeded Ray M. Gidney as Comptroller on November 16, 1961. Prior to that time, as we have seen, the Whitney program had been fully examined and approved by Mr. Gidney.

253). Contending that Whitney-Jefferson was a "branch" of Whitney-New Orleans and therefore illegal under 12 U.S.C. § 36(c), they sought a declaratory judgment and an injunction against the Comptroller prohibiting him from issuing his certificate. Whitney-Jefferson intervened as a defendant (R. 40-41, 228-29). For a time thereafter, the Comptroller voluntarily withheld issuance of his certificate. Beginning on June 27, 1962, he was enjoined from issuing it *pendente lite*, first by a temporary restraining order and subsequently by a preliminary injunction (R. 176-77, 272-73).

After the complaint was filed, the plaintiff banks and their allies took quick action on another front. On June 27 there was introduced into the Louisiana legislature, and July 10 the legislature passed, a statutory provision forbidding any subsidiary of a bank holding company to open for business if it had not yet done so. 6 La. Rev. Stat. § 1003(5). As shown more fully at pages 52-54, *infra*, this entirely new prohibition was directed specifically at Whitney-Jefferson and at Whitney-Jefferson alone. Its purpose was to prevent the functioning of an existing national bank without regard to the authorizations granted it by the competent federal agencies. The plaintiffs promptly urged Section 1003(5) upon the District Court as an additional reason why Whitney-Jefferson should not be permitted to open. The State Bank Commissioner of Louisiana, a respondent here, intervened as a plaintiff in this action on the ground that his duties included the enforcement of the new statute (R. 346-58).

All parties moved for summary judgment. The District Court held that the Comptroller was precluded from issuing his certificate by Section 1003(5), and

further held that this subsection is constitutional as applied to national banks in general and to Whitney-Jefferson in particular. The court declined to decide whether Whitney-Jefferson should be treated as an illegel "branch" of Whitney-New Orleans, R. 449-50, 211 F. Supp. at 578, and accordingly made no findings bearing on that question.

Petitioners appealed. Briefing and oral argument were directed primarily to the constitutionality of the Louisiana statute. The Court of Appeals, however, passed that issue by, and instead held that Whitney-Jefferson was an illegal branch of Whitney-New Orleans. The court relied principally on a finding of intent based on statements made by the president of Whitney-New Orleans to the Whitney stockholders and to the federal regulatory agencies.

> "The facts . . . show, we think, that Whitney-New Orleans intends to do business through Whitney-Jefferson in the same way as if the institutions were one. The president of Whitney-New Orleans frankly made this quite clear." R. 475, 116 U.S. App. D.C. at 298, 323 F.2d at 303.

The Court of Appeals so held notwithstanding the fact that the District Court had not found—and had never been asked by respondents to find—that Whitney-New Orleans intended to operate Whitney-Jefferson in any particular manner, let alone "as if the institutions were one." Had respondents raised any such issue of fact, a trial would have been required, since petitioner and the Comptroller vigorously denied that there was any intent so to operate Whitney-Jefferson (R. 388-91) and would have introduced evidence in support of their denial. Nor did the Court of Appeals consider whether

any such intent, even had it existed, could possibly have been put into effect.

The Fifth Circuit Action

The present action represents only one of two legal proceedings through which the respondents have sought to frustrate the Whitney program. On June 13, 1962, two of the present respondents filed in the Court of Appeals for the Fifth Circuit, under Section 9 of the Federal Bank Holding Company Act, 12 U.S.C. § 1848, a petition for review of the Federal Reserve Board's order approving the Whitney program. *Bank of New Orleans v. Board of Governors of the Federal Reserve System*, 5th Cir. No. 19,788 (R. 288). On October 7, 1963, the Court of Appeals for the Fifth Circuit ordered that it would withhold its decision in that action pending the result of the case presently before this Court.

SUMMARY OF ARGUMENT

I

The Court of Appeals erred in holding that, despite its lawful organization pursuant to the Federal Bank Holding Company Act of 1956, the Whitney Holding Corporation program was tantamount to the establishment by Whitney-New Orleans of a "branch" in Jefferson Parish in violation of the prohibition resulting from 12 U.S.C. § 36(c). The court ignored the nature and history of twentieth-century banking, a major element of which has been the development of holding company banking as an alternative to branching in situations where branching is prohibited. Unable to obtain all the advantages of branching, bankers have settled for some of those advantages rather than have none. Bank holding companies are frequently, as in the

present case, established by the management of a metropolitan bank, which becomes the nucleus and central management of the banking group. These facts, and the similarities and distinctions between branch banking and holding company banking, have been well known to bankers, the regulatory agencies, and Congress for decades.

(A) Congress on two occasions has made an informed and deliberate decision not to subject bank holding companies to the restrictions of 12 U.S.C. § 36 (c) on the locations of bank branches. In enacting the Banking Act of 1933, Congress considered the whole problem of federal supervision of bank holding companies and formulated a regulatory system from which any restriction on the locations of holding-company-owned banking offices is conspicuously absent. In the 1950's, Congress, in fashioning a comprehensive scheme for the supervision of bank holding companies (the Federal Bank Holding Company Act of 1956), specifically considered a proposed provision which would have subjected holding-company-owned banking offices to the same restrictions on location as those to which branches are subject, but rejected it as "an arbitrary tie-in with branch banking laws" (page 25, *infra*). This legislative history is dispositive of the present issue; since it shows that Congress has expressly rejected respondents' argument.

(B) There is, moreover, no basis for concluding that Whitney-Jefferson is or could be "in reality" a "branch" of Whitney-New Orleans. The federal laws governing national banks and bank holding companies carefully prevent a bank holding company from achieving in practical operation the unitary type of organization characteristic of branch banking. Only some

by no means all, of the advantages of branching can be had through bank holding companies. Since the differences between the two types of organization are substantial rather than merely formal, Whitney-Jefferson could not, without violation of federal law, operate as if it were a branch office of Whitney-New Orleans.

Nonetheless, the Court of Appeals found that the Whitney officials "intended" to operate Whitney-Jefferson as if it were a branch of Whitney-New Orleans, and, apparently, that the Whitney Holding system had certain characteristics which the court regarded as distinguishing it from "the traditionally recognized bank holding company" (page 34, *infra*). Not only would the supposed "intent" have been futile in light of the law governing national banks; there was also no factual basis for finding it to exist. The statements by the Whitney management on which the Court of Appeals relied amounted to no more than expressions of a desire to have a Whitney-related bank in Jefferson Parish—the sort of purpose for which bank holding companies are habitually organized. The court could read sinister intent into these statements only by misunderstanding the usual nature and purposes of holding company banking. Moreover, since intent is a question of fact, it was error for the Court of Appeals to rely on its own speculations as to this unlitigated factual issue.

There was nothing unusual—as the court apparently thought—about the source of Whitney-Jefferson's capital, the fact that it would be under common control with Whitney-New Orleans, or the similarity of the names of the two banks. Common control is ordinarily the result of common ownership, and similar names are not untypical of holding company banking. As to capi-

tal, the court ignored the fact that the funds in question were undivided profits belonging to the stockholders and could lawfully be used as they saw fit. Whitney Holding Corporation is indistinguishable in form, substance, intent or effect from the traditional, well-recognized and congressionally approved bank holding company in operation throughout the United States as a partial alternative to branch banking.

II

Nor can the Court of Appeals result be upheld on respondents' alternative argument under 6 La. Rev. Stat. § 1003(5), which purports to prohibit any new bank from opening for business if 25 per cent of its stock is owned by a bank holding company. As applied to national banks in general and to Whitney-Jefferson in particular, this section is unconstitutional.

(A) Louisiana's Section 1003(5) trespasses unconstitutionally upon the federally preempted field of the organization and chartering of national banks. The National Bank Act contains a series of provisions, 12 U.S.C. §§ 21-28, which this Court has held constitutes "by itself a complete system for the establishment . . . of national banks, prescribing the manner in which they may be formed . . . ." *Cook County Nat'l Bank v. United States*, 107 U.S. 445. The statute in unambiguous terms authorizes the Comptroller of the Currency to charter a new national bank which has complied with all requirements of federal law alone, without reference to state law. A state statute attempting to impose additional requirements on a national bank before it may do business is, therefore, invalid as in conflict with the National Bank Act, an interference

with a federal instrumentality performing federal functions, and an invasion of a legislative field which Congress has preempted. Under the settled jurisprudence of this Court, a state may not regulate national banks in a way that interferes with their full performance of their functions. *A fortiori*, a state may not keep a national bank, such as Whitney-Jefferson, out of business altogether.

(B) This conclusion is not affected by Section 7 of the Federal Bank Holding Company Act, 12 U.S.C. § 1846, which merely preserves existing state jurisdiction in the holding company field and "does not grant any new authority to States over national banks." S. Rep. No. 1095, 84th Cong., 2d Sess., pt. 2, at 5 (1956). Whatever may be the permissible range of state regulation of national bank holding companies, there can be no doubt that the Louisiana statute is unconstitutional as an unprecedented state attempt to prevent an existing national bank from doing business.

(C) Respondents are, further, precluded from justifying 6 La. Rev. Stat. § 1003(5) as legitimate bank holding company regulation because that section is arbitrary, discriminatory, *ad hoc* legislation drafted and designed to apply only to Whitney-Jefferson. Its enactment was part of a scheme in which the respondent banks procured improvidently granted restraining orders so as to delay consummation of an entirely legal program until they could manufacture a new state law to make it illegal. Even if the legislation were constitutional on its face, revelation of its discriminatory purpose would require it to be held invalid. *Gomillion v. Lightfoot*, 364 U.S. 339; *Griffin v. School Board of Prince Edward County*, 377 U.S. 218.

ARGUMENT

I

WHITNEY NATIONAL BANK IN JEFFERSON PARISH IS NOT A "BRANCH" OF WHITNEY NATIONAL BANK OF NEW ORLEANS WITHIN THE MEANING OF 12 U.S.C. § 36(c).

In the United States three types of multiple-office banking have developed: branch banking, chain banking and holding company banking. Branch banking exists when a single banking corporation conducts its operations from more than one office, *i.e.*, through branches. In chain banking, a number of separately incorporated banks (sometimes referred to as affiliates) are controlled through interlocking stock ownership by the same individual or individuals. Holding company banking (sometimes called group banking) exists when a controlling stock interest in two or more banks is owned by a single corporation, known as a bank holding company.[11]

Such considerations as customer convenience, heightened competition, the growth of large business corporations, and greater mobility of funds have created a steadily increasing need in the late nineteenth and twentieth centuries for banking systems more extensive than the small one-office banks traditional in this country. However, national banks were, in general, forbidden to take the natural course of opening branches until 1927,[12] when Congress passed the McFadden Act,

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[11] These definitions are in universal use today. See, *e.g.*, "Branch, Chain and Group Banking," in BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, BANKING STUDIES 113, 125, 130 (1941).

[12] The National Bank Act, Act of June 3, 1864, c. 106, 13 Stat. 99, which created the national banking system, contained no provision

44 Stat. 1224, allowing national banks to establish branches within their own cities if state law permitted state banks to do the same. Section 23 of the Banking Act of 1933, 48 Stat. 189, which with minor amendments is the present branch banking law, 12 U.S.C. § 36(c), further permitted national banks to branch throughout a state subject to the limits imposed on state banks by state law.

Because of legal restrictions on branch banking, banks have resorted—both before and since 1927—to the alternative methods of chain banking and holding company banking so as to obtain as many of the advantages of branch banking as may legally be had. Commonly, the chain or holding company system develops out of a preexisting metropolitan bank, which, with its experienced management, becomes the nucleus of the system of affiliates or subsidiaries. Holding company banking in particular has become a widespread feature of the banking business of this country. Congress enacted the Federal Bank Holding Company Act of 1956 to regulate this expanding phenomenon and give the Federal Reserve Board jurisdiction over it. By December 31, 1963, 52 bank holding companies, conducting operations in 32 states, had registered with the Board pursuant to the Act. Banks owned by these companies were operating 1,732 banking offices, or 6.5 per cent of all commercial banking offices in the country, with 8.2 per cent of the commercial banking de-

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for the establishment of branch offices by national banks. It was eventually held that the Act prohibited branches, First Nat'l Bank v. Missouri, 263 U.S. 640, except in certain rare cases. See Fordham, *Branch Banks as Separate Entities*, 31 COLUM. L. REV. 975, 976 (1931).

posits in the United States.[13] The creation of Whitney-Jefferson, like the adoption of chain banking by other New Orleans banks (page 5, *supra*), was merely one incident in this development.

To be sure, chain banking and holding company banking are second-best alternatives to branch banking. The fact that both involve the establishment of separately chartered institutions imposes serious limitations (described more fully hereafter[14]) under the National Bank Act. For example, unlike a branch office, an affiliate or holding company subsidiary is limited by the amount of its own capitalization in the amount of debt it may incur and the size of loans it may make. However, important benefits do accrue from cooperation between related banks with substantial identity of ownership and management. Establishment of a holding company offers the further advantage of assuring continuing identity of ownership, whereas stockholdings in affiliates in a chain banking system may come through transfers to differ one from the other. On the other hand, holding company systems are subject to countervailing disadvantages because of the additional restrictions of the Federal Bank Holding Company Act (detailed at page 29, *infra*) on relationships among subsidiaries. Depending upon particular circumstances, one form or the other may therefore be more desirable in a situation where branching is not permitted. The creation of Whitney-Jefferson reflected a decision in favor of the holding company approach.

The history of this development of three distinct

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[13] 1964 FED. RESERVE BULL. 783.

[14] Pages 28-31, *infra*.

types of multiple-office banking and the reasons for it have been traced in a number of scholarly works and are wholly familiar to the banking community and the regulatory agencies. A few pertinent excerpts from the literature relating to chain banking and holding company banking, describing the reasons for their use and their similiarities to and differences from branch banking, are collected in Appendix B to this Brief, pages 76-79, *infra*.

Congress, the courts and the regulatory agencies have recognized and given effect to the similarities and distinctions among these various types of banking organization. Indeed, the Court of Appeals for the District of Columbia Circuit itself recently pointed out the differences between branch banking and chain banking.[15] But in the case at bar, the Court of Appeals closed its eyes to the accepted genuine conceptual and practical differences between branch banking and holding company banking and to Congress' express determination that holding company subsidiaries should be free of some of the restrictions imposed on branches. Moreover, the Court of Appeals based its decision on its own wholly irrelevant and improper factual determination that petitioner "intended" to establish a branch in the guise of a co-subsidiary.

The holding of the Court of Appeals rests upon a moralistic extension of a dialectical error. The dialectical error is that things which have some characteristics in common are identical. The moralistic extension is that one who uses an implement which has characteristics in common with a forbidden implement is illegally

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[15] Camden Trust Co. v. Gidney, 112 U.S. App. D.C. 197, 301 F. 2d 521 (1962) (Washington, Danaher and Bastian, JJ.), *cert. denied*, 369 U.S. 886.

evading an edict of law. Let us illustrate: the farm bloc, in order to impede suburban vegetable gardening, induces the legislature to forbid the use of hoes. A man says to his friends, "Do not despair. A rake will do well enough to get two-thirds of a crop. True, it will not dig rows, or make mounds, or chop out weeds; but it will break up the surface, remove stones, and so on. Let's do the best we can with rakes." The Court of Appeals would declare him in violation of the law, because it would think that he intended to use a rake as if the implement were the same thing as a hoe.

But the fact of the matter is that a rake is not the same thing as a hoe. And if the rake wielder can further show that the same legislature that forbade the use of hoes has made provision for the licensing of rakes, and that in conformity with that provision he has a license to use his rake as he intends to use it, surely on more considered judgment the Court of Appeals will be held to have been wrong.

Such is the situation here.

A. *CONGRESS HAS DELIBERATELY CHOSEN NOT TO SUBJECT BANK HOLDING COMPANIES TO THE LEGAL RESTRICTIONS ON LOCATIONS OF BRANCHES OF NATIONAL BANKS.*

Congress has been fully aware of the development of bank holding companies and of the reasons for that development. Congressional committees on numerous occasions heard the views of the federal regulatory bodies and of private interests, including the Independent Bankers Association, which regularly argues that holding company banking is an evasion of restrictions on branch banking. See, *e.g., Lamb, Group Banking* 40, 179-80 (1961). On two separate occasions Congress

has made clear its informed decision to regulate branch banking and holding company banking differently, particularly with respect to restrictions on the locations of banking offices. One of these occasions was the enactment in 1933 of the crucial statutory provision here in question, 12 U.S.C. § 36(c). On the other occasion, in 1956, Congress rejected a proposal which would have made this provision expressly applicable to holding company banking.

(1) The Banking Act of 1933

The present provision governing branch banking by national banks—12 U.S.C. § 36(c), the section which the Court of Appeals interpreted as prohibiting the existence of Whitney-Jefferson—originated in the Banking Act of 1933. 48 Stat. 162, 189. The drafting of the 1933 Act followed a broad and lengthy congressional inquiry into the development of holding company banking, its nature and its purposes.[16] The

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[16] For example, the testimony of John W. Pole, then Comptroller of the Currency, included a classic exposition of the developing role of bank holding companies in the light of restrictions on branching:

> "Local holding companies have been formed in many sections of the country for the purpose of bringing together a number of the banks into a single operating group. The usual procedure is for the holding company, a State corporation, to purchase a majority of the stock of several banks, one of which would be a large city bank which in effect becomes the parent bank of the group. The management personnel of the central bank becomes in practice the responsible management for the entire group. Through such a group system it appears to be possible to make a close approach to a form of branch banking whereby

legislative history shows that Congress (1) was fully aware of the characteristics of holding company banking, (2) formulated a very different system of regulation to deal with it, and (3) deliberately refrained from subjecting it to the provisions of Section 36(c), which prescribes the conditions in which branches may be established.

Sections 5(c), 19 and 27 of the Banking Act of 1933, 48 Stat. 165, 186, 191-92, imposed a number of restrictions on bank holding companies. These provisions, with a few amendments, remain in force today.[17] They contain no restriction on the locations at which offices of banks owned by the same bank holding company may operate.[18] Congress could easily have applied Section 36(c), as well, to holding company banking had it so wished. Instead it carefully applied Section 36(c) only to branches,[19] and enacted the very

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each operating unit leans for support upon the central bank, or upon the holding company, and receives the benefits of its moral and financial support; its prestige and good will; its extension of the wider type of banking service; and the benefits of its highly trained management." *Hearings Before the House Committee on Banking and Currency Under House Resolution 141 (Group, Chain and Branch Banking)*, 71st Cong., 2d Sess., vol. 1, pt. 1, at 5 (1930). (See also *id.* at 26.)

[17] 12 U.S.C. § 61; 48 Stat. 191 (1933), as amended, 12 U.S.C. § 161 (1958), as amended, 12 U.S.C. § 161 (Supp. V, 1959-63); 48 Stat. 162, 165, 192 (1933), as amended, 12 U.S.C. §§ 221a, 334, 481 (1958). See pages 30-31, *infra*, for a discussion of some of these restrictions.

[18] S. Rep. No. 77, 73d Cong., 1st Sess. 10-11 (1933), describes holding company banking and explains the reasons for the particular forms of regulation chosen.

[19] The branch banking statute contains a partial definition of the term "branch," 12 U.S.C. § 36(f), set forth in Appendix A, page 61.

different set of provisions just mentioned to deal with holding company banking.

(2) THE FEDERAL BANK HOLDING COMPANY ACT OF 1956

The Federal Bank Holding Company Act of 1956 and its legislative history disclose even more clearly the repeated decision of Congress not to subject bank holding companies to the geographic restrictions on the locations of bank branches. This Act (12 U.S.C. §§ 1841-48) was passed after eighteen years of Congressional study. It contains a comprehensive scheme for federal regulation of bank holding companies and their subsidiaries. Congress was fully aware that such companies frequently own and operate banks in circumstances where a single bank would be prohibited from maintaining branches. Congress considered many different techniques and proposals for the regulation of bank holding companies, and enacted those which it determined were most desirable. Wholly absent from the Act, though it had been proposed, is a requirement that any or all holding company operations conform to the restrictions on location applicable to branch banking.

Efforts were made in both the House and the Senate

infra. Unfortunately that definition is not helpful in resolving the present problem. The wording and content of Section 36 as a whole, however, make it plain that a "branch" is envisaged as being part of a single corporation. *Cf.* 12 U.S.C. §§ 601-04, referred to in Section 36(g), which make a clear distinction between establishment of branches and stock ownership in separately chartered banks. 38 Stat. 273 (1913), as amended, 12 U.S.C. §§ 601, 602, 604 (1958); 39 Stat. 755 (1916), as amended, 12 U.S.C. § 603 (1958). Respondents' argument that Whitney-Jefferson is a "branch" within the actual language of Section 36(c), without any necessity for "piercing the corporate veil," is therefore without merit.

to apply the geographic restrictions on branch banking to bank holding company operations. The proposed language read:

> "Nothwithstanding any other provision of this section, no application shall be approved under this section which will permit . . . (2) any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank, except (i) within geographic limitations that would apply to the establishment of branches of banks under the statute law of such State . . . ." H.R. 6227, S. 880, § 5(c), 84th Cong., 1st Sess. (1955).

This section was included in the bill as it was reported by the House Banking and Currency Committee and as it passed the House. The House Committee, in support of its version, argued that the differences between branch banking and holding company banking were "differences without a distinction," so that it was appropriate to "base holding company legislation on branch banking law."[20]

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[20] H.R. Rep. No. 609, 84th Cong., 1st Sess. 3 (1955). To the same effect see the remarks of Chairman Spence of the House Banking and Currency Committee, floor manager of the House bill. 101 Cong. Rec. 8021 (1955). These sources have repeatedly been quoted by respondents as part of the legislative history of the Federal Bank Holding Company Act. The point, of course, is that these contentions that branch banking and holding company banking should be treated alike were made in support of the House version of the bill, which Congress eventually rejected. Respondents are simply rearguing an issue which Congress decided adversely to them eight years ago.

In the Senate, however, the differences between these two forms of banking were thought to be significant, and the view that holding companies should be regulated differently from branches prevailed in the legislation as finally enacted. Extended testimony and arguments for and against the House approach were presented to a subcommittee of the Senate Committee on Banking and Currency.[21] The Senate Committee, after full consideration, reported to the Senate a bill that eliminated the proposed tie-in with the branch-banking law. The Committee gave its reasons for rejecting that proposal as follows:

> "*The committee decided against inclusion of a provision in the bill that would automatically apply State laws concerning branch banking to bank holding company operations.* The purposes of branch banking laws are not identical with the purpose of this bill to control bank holding companies. Moreover, branch banking is mostly conducted by the use of depositors' funds, thus making the protection of these funds of prime importance. Bank holding companies, however, as such have no depositors. For operating funds they have recourse to equity capital supplied by their shareholders. *It is believed the bill contains adequate provisions to regulate bank holding company operations without an arbitrary tie-in with branch banking laws.*" S. Rep. No. 1095, 84th Cong., 1st Sess., pt. 1, at 11 (1955). (Italics added.)

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[21] *Hearings Before a Subcommittee of the Senate Committee on Banking and Currency (Control of Bank Holding Companies)*, 84th Cong., 1st Sess. 45, 47-48, 77-78, 80-82, 85, 89-90, 104-05, 107, 111, 112-29 (1955).

The statute as enacted incorporates the Senate, not the House, approach. The House concurred in the Senate amendments without sending the bill to conference. The statute expressly permits the purchase of bank stock by a bank holding company upon approval by the Federal Reserve Board. The Board is directed to consider five factors in deciding whether to approve or disapprove an application for such approval. 12 U.S.C. § 1842(c). Conspicuous by its absence is any provision that the application must be disapproved if Section 36(c) would prohibit the establishment of a branch in the same circumstances. That proposal Congress expressly rejected.

It may be that a court is sometimes justified in applying to situation *B* a statute that in terms reaches only situation *A* when *A* and *B* are very similar and it is clear that the legislature would have covered *B* had it had that variant of the problem in mind. There is no justification for such an application where, as here, the legislature had *B* very clearly in mind, but deliberately refused to apply the statute to it. Congress was told by a sponsor of the legislation that through the holding company device some bankers had "circumvented the branch banking laws and accomplished something that the branch banking laws had attempted to prevent." 101 *Cong. Rec.* 8021 (1955) (Rep. Spence). In the face of this argument Congress deliberately deleted from the bill it sent to the President a provision which adopted Representative Spence's view and would have permitted bank holding company subsidiaries to operate only where branches could operate. The judiciary may not write the deleted provision back into the statute by treating as a branch what is in fact a co-

subsidiary. This would be true even if the only differences between Whitney-Jefferson as a co-subsidiary of Whitney-New Orleans and Whitney-Jefferson as a branch of Whitney-New Orleans were differences of form. In fact, largely because of the restrictions that Congress did choose to impose upon bank holding companies, there are, as we shall now show, very significant differences of substance between the two situations.

B. *THE COURT OF APPEALS' DETERMINATION THAT WHITNEY-JEFFERSON WOULD "TO ALL INTENTS AND PURPOSES" BE A BRANCH IN EVASION OF THE LAW WAS UNFOUNDED.*

Even if Congress had not made explicit its considered decision—which the Court of Appeals did not even discuss—that the form of organization chosen by petitioner is determinative so far as the applicability of the branch banking law is concerned, there would be no basis for the Court of Appeals' conclusion that "in reality" Whitney-Jefferson would operate as if it were a branch of Whitney-New Orleans. Of course, holding company banking is similar in some practical respects to branch banking, just as both forms are similar in some practical respects to chain banking. But in its myopic concentration on these common elements, the Court of Appeals lost sight of the crucial practical respects in which the planned relationship between the two Whitney banks would differ from that between two branches of a single institution. Insofar as the Court believed that the two banks could—regardless of intent—be operated as one, it erred as a matter of law. Insofar as it found an intent to operate Whitney-Jefferson as a branch and not in accordance with the nor-

mal pattern of holding company banking, it erred as a matter of fact. Moreover, in making such a factual determination on a record indicating the contrary, when the District Court had not even considered the question, it exceeded its jurisdiction as an appellate court.

To demonstrate that two separately chartered subsidiaries of a single holding company (such as Whitney-New Orleans and Whitney-Jefferson) could not possibly be operated as are two branches of a single bank, it is necessary to look no further than the text of the federal banking laws. The crucial distinctions will become apparent if we examine the statutory rules governing some of the most basic rights and obligations of banks and of those who deal with them: their depositors, their borrowers, their shareholders.

(1) *Their Depositors:* Each deposit in a branch office of a bank has the same status as a deposit in the main office, and is backed by the combined capital and assets of the entire bank. Since the branch has no separate assets, it cannot become insolvent unless the whole combined operation fails, and in that event all depositors would have claims against the entire assets of the bank. In contrast, Whitney-Jefferson, as a separately incorporated national bank, is alone responsible for deposits made with it. Its solvency or insolvency would be determined with reference only to its separate assets, consisting of $500,000 in capital, $100,000 in surplus, and $50,000 in undivided profits, and would be unaffected by Whitney-New Orleans' $30,000,000 capital and surplus.[22] Upon insolvency depositors could look only to Whitney-Jefferson's assets and would

[22] Rev. Stat. § 5242 (1875), 12 U.S.C. § 91 (1958).

have no claim on those of the city bank.[27] Only Whitney-Jefferson's own directors would be liable for a violation by that bank of the National Bank Act. 12 U.S.C. § 93. Whitney-Jefferson could not contract debts in excess of its own capital, $500,000. 12 U.S.C. § 82.

If the two banks were operated as one, their capital, assets and obligations would be mingled by definition, as are those of branches. But the Federal Bank Holding Company Act of 1956 prevents any mingling of funds between a bank holding company and a subsidiary or among subsidiaries. Whitney-New Orleans may not invest any of its funds in obligations of Whitney-Jefferson, 12 U.S.C. § 1845(a)(1); or accept obligations of Whitney-Jefferson as collateral for a loan, 12 U.S.C. § 1845(a)(2); or purchase any securities, assets or obligations from Whitney-Jefferson under repurchase agreements. 12 U.S.C. § 1845 (a)(3). Perhaps most important, Whitney-New Orleans may not make any loan, discount or extension of credit to Whitney-Jefferson. 12 U.S.C. § 1845(a)(4). These restrictions all operate equally against Whitney-Jefferson. Moreover, they prevent transfers or other transactions between either bank and the holding company, and hence between the two banks through the vehicle of the holding company.

(2) *Their Borrowers:* If the two banks were operated as one, Whitney-Jefferson could make loans to any

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[27] 19 Stat. 63 (1876), as amended, 12 U.S.C. § 191 (1958), as amended, 12 U.S.C. § 191 (Supp. V, 1959-63); Rev. Stat. § 5234 (1875), as amended, 12 U.S.C. § 192 (1958), as amended, 12 U.S.C. § 192 (Supp. V, 1959-63); Rev. Stat. §§ 5235-38 (1875), 12 U.S.C. §§ 193-96 (1958); 19 Stat. 63 (1876), as amended, 12 U.S.C. § 197 (1958), as amended, 12 U.S.C. § 197 (Supp. V, 1959-63); 24 Stat. 8 (1886), 12 U.S.C. §§ 198-200 (1958).

one borrower in any amount up to $3,000,000, that is, ten per cent of the total of its capital and surplus combined with those of Whitney-New Orleans. But as a separate bank it is limited to loans of only $60,000. 12 U.S.C. § 84. Any attempt by Whitney-Jefferson to make a loan in excess of its own loan limit based on its own separate assets would lead to immediate revocation of its charter and personal liability of its directors under 12 U.S.C. § 93.[24]

(3) *Their Shareholders:* The shareholders of a single bank with multiple branch offices may, of course, directly control the operations of the bank and all its offices. But the shareholders of the holding company which owns the two Whitney banks have no such normal full and direct control over its subsidiary banks. This is the result of the restrictions which the "holding company affiliate" provisions of the Banking Act of 1933 impose upon a bank holding company in the control of its subsidiaries. The most dramatic of these restrictions forbids a holding company to vote its bank stock without first applying to the Federal Reserve Board for a voting permit, which the Board may grant

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[24] The Court of Appeals attached significance to a statement by the President of Whitney-New Orleans that Whitney-Jefferson's depositors would have "access to the large loan limits of the combined banks." R. 471, 116 U.S. App. D.C. at 296, 323 F. 2d at 301. This statement meant no more than that, if Whitney-Jefferson received a request for a loan in excess of its loan limit, it could offer a participation in that loan to Whitney-New Orleans. Most banks, independent and otherwise, frequently share large loans with other banks. It is natural and customary for a bank holding company subsidiary to offer participations to its co-subsidiaries in preference to banks under different ownership. This was expressly recognized by the court in First Nat'l Bank in Billings v. First Bank Stock Corp., 306 F. 2d 937, 942 (9th Cir. 1962).

or withhold in its discretion. 12 U.S.C. § 61. The same section imposes restrictions on the dividends which may be paid by a bank holding company, and requires the holding company to maintain reserves of readily marketable assets other than the bank stocks which it owns. None of these restrictions apply to a bank operating two or more offices.

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Despite the obvious fact that these statutory limitations on holding company operations would render ineffectual any plan to operate Whitney-Jefferson as if it were a branch of Whitney-New Orleans, the Court of Appeals found, after describing the Whitney plan, that

> "The facts already recited sufficiently show, we think, that Whitney-New Orleans intends to do business through Whitney-Jefferson in the same way as if the institutions were one." R. 475, 116 App. D.C. at 298, 323 F.2d at 303.

This finding of fact was not only irrelevant, but also unsupported by the record and improperly made by the Court of Appeals in the posture of the case before it.

Intent is, of course, a question of fact. In this case, it was a question on which the District Court made no findings and heard no evidence, since it decided the case on summary judgment without reaching the branch banking issue. Nor did the parties go into the factual question of intent when the branch banking issue was raised in the District Court. Respondents did not even allege such an intent, either in their complaint (R. 6-20)

or in the statement of facts supporting their motion for summary judgment (R. 275-93).[25]

The Court of Appeals appears to have believed that the record revealed undisputed facts supporting its inference as to Whitney-New Orleans' intent. It stated that "the President of Whitney-New Orleans [Mr. Berry] frankly made this quite clear". (R. 475, 116 U.S. App. D.C. at 298, 323 F.2d at 303). So far as appears, the court relied almost entirely upon Mr. Berry's statements to the stockholders of Whitney-New Orleans explaining and justifying the proposed program and upon statements made concerning the program by the regulatory agencies which approved it. The Court of Appeals apparently ignored the undisputed sworn affidavit (R. 388-91) of Mr. Gilly, the President of Whitney-Jefferson, which affirmatively shows that it was not intended that the two banks be operated as one. That affidavit shows, for example, that "Whitney-Jefferson will operate a banking house entirely separate from that of Whitney-New Orleans" (R. 388); that the banks would have only one officer or employee in common, and that their boards of directors are not the same; that "Whitney-Jefferson has and will maintain its own books of account and its own stationery, checks and forms, none of which mention Whitney-New Orleans" (R. 389); and that Whitney-Jefferson would not deviate from normal banking practices regarding accepting deposits for accounts in, and

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[25] Respondents did allege that Whitney-Jefferson was *in law* a "branch" and that the purpose of the Whitney program was to "evade" the branch banking laws; but these are patently conclusory assertions which do not amount to an allegation of fact regarding Whitney-New Orleans' intent as to how Whitney-Jefferson would be operated.

cashing checks drawn on other banks, including Whitney-New Orleans.

Even if the Court of Appeals' view of Whitney-New Orleans' intent were not thus contradicted by sworn statements in the record, it would have been inappropriate for the Court of Appeals to decide such a question on summary judgment. The record contained scant evidence on the question of intent, since that factual issue had not been raised in the District Court. The statements by Mr. Berry upon which the Court of Appeals relied were not testimony, and he had no opportunity to explain them in the context in which they were used by the Court of Appeals. The Court of Appeals' apparent determination that "motive and intent play leading roles" in this case required it to heed this Court's admonition that summary judgment should be used sparingly in such a situation. *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473. In view of the material in the record contrary to the Court of Appeals' view, it was even more clearly error for that court—if it thought that intent was crucial—to fail to remand the case for a trial at which the facts could be fully developed and the issue resolved. *E.g., Fountain* v. *Filson*, 336 U.S. 681; *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249; *Eccles* v. *Peoples Bank of Lakewood Village*, 333 U.S. 426; *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620.

Moreover, the statements by Mr. Berry upon which the Court of Appeals relied (R. 470-76, 323 F.2d at 301-04) support no inference of intent to evade any statute by operating the two Whitney banks as one. Passing the point that if Mr. Berry believed that this could be done he would have been the most bemused banker in the national banking system, it is enough

that he did not say anything so foolish. What he did do was to point out to the stockholders—as any number of banking authorities, official and otherwise, had pointed out before him; see Appendix B, pages 76-79, *infra*—those benefits of branch banking which Congress permitted under a bank holding company plan approved by the federal authorities. Far from being "a very good description of a branch banking operation," as the Court of Appeals characterized it (R. 471, 116 U.S. App. D.C. at 296, 323 F.2d at 301), what Mr. Berry said was rather "a very good description" of those advantages which could be properly achieved through the holding company form of organization in a situation where "a branch banking operation" is not permitted.

The Court of Appeals appears to have been of the view that the Whitney holding system would not violate the branch banking provision of the National Bank Act but for certain peculiar characteristics said to distinguish it from "the traditionally recognized bank holding company which, with its own capital, invests in or buys the stock of banks" (R. 474, 116 U.S. App. D.C. at 298, 323 F. 2d at 303). The court was at pains to point out such distinguishing characteristics in an effort to reconcile its decision in the present case with its own earlier decision in *Camden Trust Co. v. Gidney*, 112 U.S. App. D.C. 197, 301 F.2d 521 (1962), *cert. denied*, 369 U.S. 886, and the decision of the Court of Appeals for the Ninth Circuit in *First Nat'l Bank in Billings v. First Bank Stock Corp.*, 306 F.2d 937 (9th Cir. 1962). In *Camden Trust*, the court had held that a chain banking affiliation arrangement did not constitute forbidden branching.[26]

[26] After the Comptroller had denied an application for the establishment of a branch, the directors of the Haddonfield National

In *Billings*—the only litigation prior to the present case in which it has been argued that a bank holding company subsidiary was really a branch—the Ninth Circuit rejected the argument, holding that "the unitary type of operation characteristic of branch banking is not present" (306 F.2d at 943).[27]

The Court of Appeals stated the supposed distinctions between the Whitney holding plan and what it

Bank established a new national bank. They expressly declared to Haddonfield's shareholders, under the letterhead of that bank, that the reason for establishing the new bank was that Haddonfield was prohibited from operating a branch at the location in question. 112 U.S. App. D.C. at 199, 301 F. 2d at 523, n. 7. As in the present case, a competitor bank challenged the authority of the Comptroller to charter the new bank on the ground that it was in substance a forbidden branch. Rejecting this contention, the court simply recited the various statutory provisions that would make it impossible for two national banks to be operated as though they were one. 112 U.S. App. D.C. at 200-01, 301 F. 2d at 524-25. It should be noted that the *Camden* arrangement was not subject to the additional restrictions deriving from the Federal Bank Holding Company Act of 1956 which apply in the present case. A commentator has noted that "*Camden* and *Whitney* are somewhat difficult to reconcile . . . ." James F. Bell, *National Bank Branches—the Authority To Approve and To Challenge*, 19 BUS. LAW. 887, 900 (1964).

[27] The Court of Appeals here relied, R. 475, 116 U.S. App. D.C. at 298, 323 F. 2d at 303, on the statement in *Billings*, 306 F. 2d at 942, that "in the banking field, as elsewhere, courts have power to 'pierce the corporate veil' when the realities require it." Since in *Billings* the court was concerned with an alleged branch which was already in operation, it had no occasion to inquire whether the "realities" of banking regulation could *ever* permit two separately chartered banks to operate as one. Moreover, the alleged branch in *Billings* was a state bank rather than a national bank, and thus a number of the regulatory restrictions discussed here were not applicable.

regarded as the usual—and hence presumably proper—chain banking or bank holding company arrangement as follows:

> "... [1] [T]he holding company is not providing Whitney-Jefferson with new and fresh capital, but with capital supplied by Whitney-New Orleans; [2] the new bank will be managed and controlled by the executives of Whitney-New Orleans; and [3] the name, Whitney National Bank in Jefferson Parish ... is easily susceptible of confusion with the parent organizer, The Whitney National Bank of New Orleans." R. 477, 116 U.S. App. D.C. at 299, 323 F.2d at 304.

Any such implication that the perfectly normal transactions involved in the creation of Whitney Holding and Whitney-Jefferson constituted an "elaborate and ingenious scheme" (R. 470, 323 F.2d at 301) of vaguely dubious and deceptive "corporate maneuvering" (R. 476, 323 F.2d at 304) is false. It can derive only from misunderstanding of the transactions involved or lack of familiarity with the nature and development of modern banking as already described (pages 16-20, *supra*).

(1) *Source of capital.* The court's statement that the funds with which the new bank was set up were not "new and fresh capital," but rather "capital supplied by Whitney-New Orleans," reflects confusion either about the nature of the reorganization or about the meaning of the word "capital." Withdrawal of "capital" from a national bank "either in the form of dividends or otherwise" is prohibited by law. Rev. Stat. § 5204 (1875), 12 U.S.C. § 56 (1958). No one claims that this provision has been violated. The funds for the new

bank had never previously been part of the capital funds of Whitney-New Orleans or any other bank. They came in fact from undivided profits of Whitney-New Orleans, upon which federal and state income taxes had been paid, and which were available for dividends.[28] These funds belonged to the stockholders of Whitney-New Orleans, who, instead of taking payment individually, directed that the funds be paid as a dividend to the new holding company, also owned by them, after it became the single stockholder of Whitney-New Orleans.

If instead these funds had been paid as a dividend to the individual stockholders of Whitney-New Orleans and used by them to establish the new bank, they would have constituted "strictly fresh" capital within the highest standards of the egg market. It made no difference that the stockholders instead chose to have these earnings paid as a dividend to the new single stockholder—the holding company—to be used by it for the same purpose. Surely the funds lost none of their "freshness" by the use of this route. Nor did it make any difference—as the Court of Appeals asserted in its attempt to distinguish the *Billings* case—whether the holding company was a preexisting one (whose funds presumably would have come from previously paid-out earnings of its subsidiary bank or

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[28] Although respondent banks originally asserted that the capital of Whitney-Jefferson came from the capital funds of Whitney-New Orleans (*e.g.*, R. 432) and alternatively that it came from the surplus of Whitney-New Orleans (R. 433-34), they have subsequently admitted that Whitney-New Orleans had undivided profits far in excess of the amount needed to capitalize Whitney-Jefferson. See, *e.g.*, page 5 of their Brief in Opposition to Petitions for Certiorari

banks) or a new one.[29] In either case, the holding company's funds are equally "its own."

(2) *Control.* The court's second point was that the new bank would be subject to ultimate management and control by the executives of the metropolitan bank. Of course it would. As the court pointed out in the *Billings* case,

> "This [identical over-all management and common policies] is a usual, although not necessary, result of common ownership and control." 306 F.2d at 942. See also, *e.g.*, *Lamb, Group Banking* 80 (1961).

As amply made clear by the authorities collected in Appendix B, pages 76-79, *infra*, this is the most common purpose of establishing a bank holding company. Congress was well aware of this fact when it sanctioned bank holding companies in the Federal Bank Holding Company Act of 1956. See *e.g.*, S. Rep. No. 1095, 84th Cong., 1st Sess., pt. 1, at 2 (1955). That statute itself prohibits bank holding companies from engaging in any business *other than* "that of banking or of managing or controlling banks." 12 U.S.C. § 1843(a)(2).

Perhaps the Court was troubled because it thought that the typical, and only proper, bank holding company situation is one in which a separate management deals, rather distantly, with managements of a number of subsidiary banks of about the same size and strength. But this is not ordinarily the case. In fact, a bank hold-

[29] The court in *Billings* never mentioned where the holding company there involved got the funds to capitalize the alleged branch, and accordingly attached no relevance to it. The funds presumably came from the same source as here, that is, funds available for dividends in the member banks of the holding company system

ing company usually grows up around a central metropolitan bank as a nucleus, and, particularly in the early stages of its development, the management of the holding company is likely to be identical with that of the central bank. See Appendix B, page 76, *infra*, and n. 16, page 21, *supra*. In short, it is normal for bank holding companies, like most other owners, to control the banks which they own.[30]

(3) *Names.* The court's third point is that the name Whitney National Bank in Jefferson Parish is susceptible of confusion with the name Whitney National Bank of New Orleans. The name of a new national bank is subject to the discretionary approval of the Comptroller, 12 U.S.C. § 22, and the name of Whitney-Jefferson has been approved by him. In this case the name of course would suggest, and was meant to suggest, close connection between the banks and the benefits of experienced and reliable management, high integrity and the best banking connections. These are normally recognized characteristics of holding company banking.

One factor that the Comptroller properly could and did consider in exercising his discretion is that the Jefferson Parish affiliate of the National Bank of Commerce of New Orleans, Whitney-New Orleans' largest competitor, is named the National Bank of Commerce in Jefferson Parish (R. 42). Such similarity of names is a not uncommon characteristic of holding company banking. See R. 339 and *Lamb, Group Banking* 140 (1961).

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[30] The exercise of such control, however, is limited in the Whitney system as in all other bank holding company systems—by the provisions of law described at pages 30-31, *supra*.

The Court of Appeals' opinion is an exercise in unreality. Not only does it ignore Congress' explicit and determinative decisions, on two occasions, that the geographic restrictions applicable to branch banking should not apply to holding company banking. It also ignores the real distinctions between these forms of organizations underlying and flowing from those Congressional decisions. A holding company subsidiary organized under the applicable law is different from a branch. It simply cannot operate as a branch, regardless of the "intent" of its principals or any peculiar circumstances or particular situations.

The decision of the Court of Appeals appears to involve the unstated holding that an alleged intent to do something impossible of achievement may render an otherwise legal undertaking illegal. One may legitimately wonder how the Comptroller and the Federal Reserve Board would be expected to apply the Court of Appeals' ruling in passing on applications to charter new banks or to acquire bank stock. Must they inquire whether the bank officials in question have at any time made any statement to their stockholders, to the agencies themselves, or to any one else which could be construed as indicating an intent to operate two banks as though they were one—even though the Comptroller and the Board know perfectly well that no such effort could succeed without violation of law and forfeiture of the bank charters?

Despite the natural judicial attraction for "piercing the corporate veil," there is simply no occasion for doing so here. For there is nothing concealed behind the supposed "veil."

II

A STATE STATUTE PURPORTING TO PROHIBIT A NATIONAL BANK FROM DOING BUSINESS IN THAT STATE IS UNCONSTITUTIONAL.

Neither court below adopted the ground for decision upon which the other rested. The District Court held that the opening of Whitney-Jefferson is prohibited by 6 La. Rev. Stat. § 1003(5), which reads in relevant part as follows:

> "It shall be unlawful . . . (5) for any bank holding company or subsidiary thereof to open for business any bank not now opened for business, whether or not, a charter, permit, license or certificate to open for business has already been issued."

The Court of Appeals' decision cannot, however, be justified on this ground. If applied to national banks, Louisiana's Section 1003(5) violates the Supremacy Clause (art. VI, cl. 2) of the Constitution of the United States, because it is in conflict with the National Bank Act, a valid federal statute, and interferes with the lawful federal function of establishing and maintaining a national banking system. Moreover, as arbitrary, discriminatory, *ad hoc* legislation, it also violates the equal protection and due process clauses of the Fourteenth Amendment.

A. *CONGRESS HAS PREEMPTED THE FIELD OF THE ORGANIZATION AND CHARTERING OF NATIONAL BANKS.*

National banks are regulated principally by the National Bank Act, first enacted a century ago to establish a national banking system, and since then frequently amended. The Act includes a series of provisions in

which Congress has set forth a comprehensive system for the organization, establishment and commencement of business of national banks, including a complete prescription of the standards such a bank must meet in order to receive federal authorization. 12 U.S.C. §§ 21-28.

Section 21 of Title 12 provides for articles of incorporation. Section 22 provides for the execution of an organization certificate and its transmission to the Comptroller of the Currency. Section 24 provides that a national banking association shall become a body corporate "as from the date of the execution of its organization certificate," and sets forth in great detail the corporate powers of such associations. Section 26, which is particularly important here, then requires the bank to notify the Comptroller that it has "complied with all the provisions of *this chapter*[31] [the National Bank Act] required to be complied with before an association shall be authorized to commence the business of banking." The Comptroller is then directed to conduct an investigation into a number of matters specifically named, "and generally whether such association has complied with all the provisions of *this chapter* required to entitle it to engage in the business of banking."

Section 27 then provides that as a result of his "examination of the facts *so reported*" the Comptroller shall determine whether "such association is *lawfully* entitled to commence the business of banking," and if so shall issue a certificate attesting "that such association has complied with *all the provisions* required to

[31] The italics in this and the following paragraphs have been added. Sections 26 and 27 are set forth in full in Appendix A, pages 59-60, *infra*.

be complied with before commencing the business of banking." The Comptroller may withhold his certificate "whenever he has reason to suppose that the shareholders have formed the same for any other than the legitimate objects contemplated by *this chapter*." In this context, nothing could be more clear than that the word "lawfully" refers to the requirements of the National Bank Act alone and not to the law of any state.[32] The Act does not even instruct the Comptroller to consult with state authorities or to notify them of his intention to charter a new national bank.

These provisions plainly express a Congressional intent to preempt the field of the establishment and chartering of national banks. This Court has so held. "[T]he National Bank Act constitutes 'by itself a complete system for the establishment and government of National Banks'." *Deitrick v. Greaney*, 309 U.S. 190, 194. The Court was there quoting from *Cook County Nat'l Bank v. United States*, 107 U.S. 445, where it had declared:

> "We consider that act [the National Bank Act] as constituting by itself a complete system for the *establishment* and government of national banks, *prescribing the manner in which they may be*

[32] The Comptroller's certificate itself states: "Whereas, satisfactory evidence has been presented to the Comptroller of the Currency that . . . [name of bank] has complied with *all provisions of the statutes of the United States* required to be complied with before being authorized to commence the business of banking as a National Banking Association; Now, therefore, I hereby certify" that the bank may commence business. R. 311. (Italics added.) This language has appeared, without substantial change, in the certificate ever since the beginning of the national banking system in 1863, and is thus evidence of the long-standing official construction of the statutory language.

> *formed*, . . . [etc.]. Everything essential to the *formation* of the banks, the issue, security, and redemption of their notes, the winding up of the institutions, and the distribution of their effects, are fully provided for, *as in a separate code by itself*, neither limited nor enlarged by other statutory provisions. . . ." 107 U.S. at 448. (Italics added.)

In *Cook County* the Court used this reasoning to hold inapplicable to national banks certain *federal* legislation which on its face was broad enough to apply to them.[33] Obviously the Court would have held any attempted *state* interference with the establishment of a national bank to be precluded.

The Louisiana statute not only trespasses upon a field lawfully preempted by Congress, but does so in a manner in plain conflict with the provisions of federal law. The National Bank Act says that the Comptroller may issue his certificate if he finds that the applicant has complied with all the provisions of that Act itself, and the national bank may then commence the business of banking. Louisiana, as its statute is interpreted by the District Court, now says that compliance with the National Bank Act is not enough; the Comptroller may not issue his certificate and the bank may not open unless it has complied with further requirements imposed by state law. These statutes are incompatible; one or the other must give way.

McCulloch v. Maryland, 4 Wheat. 316, upholding the right of the Federal Government to maintain a national

[33] The precise question was whether provisions of the bankruptcy law giving the United States, when a creditor, a priority in the assets of "any insolvent person" applied to the assets of a national bank. The Court held that they did not.

banking system unimpeded by a state tax thereon, was the first of a long line of decisions holding various kinds of attempted state interference with national banks unconstitutional. The states have been held without power, for example, to regulate the distribution of the assets of insolvent national banks (*Davis v. Elmira Savings Bank*, 161 U.S. 275, 283), to regulate the right of insolvent national banks to receive deposits (*Easton v. Iowa*, 188 U.S. 220), and to prohibit national banks from using such words as "savings" in their names or advertisements (*Franklin Nat'l Bank v. New York*, 347 U.S. 373). No federal statute expressly authorized the use of the words at issue in *Franklin*, but the Court held that such use was implicitly authorized by provisions permitting national banks to accept savings deposits.

These cases struck down state legislation which affected the operation of national banks in ways which this Court believed to impair their proper functioning as federal instrumentalities.[34] The Louisiana statute here in question goes much farther. It attempts to frustrate completely the act of a duly authorized fed-

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[34] These principles were again affirmed during the last term in Mercantile National Bank at Dallas v. Langdeau, 371 U.S. 555, where the Court held a state decision that a national bank could be sued in a certain state court to be inconsistent with controlling federal law. See also First Nat'l Bank v. California, 262 U.S. 366; Nat'l Bank v. Commonwealth, 9 Wall. 353, 362; American Surety Co. v. First Nat'l Bank, 141 F. 2d 411 (4th Cir. 1944); Starr v O'Connor, 118 F. 2d 548 (6th Cir. 1941); Dinan v. First Nat'l Bank, 117 F. 2d 459 (6th Cir. 1941), *cert. dismissed*, 315 U.S. 824; Cooper v. O'Connor, 70 U.S. App. D.C. 238, 105 F. 2d 761 (1939); American Surety Co. v. Baldwin, 90 F. 2d 708 (7th Cir. 1937); Brust v. First Nat'l Bank, 184 Wis. 15, 198 N.W. 749 (1924); 7 MICHIE, BANKS AND BANKING, c. 15, § 5 (1944).

eral official in creating a national bank pursuant to the provisions of the National Bank Act, by preventing the bank from doing business. This state statute, if upheld, would prevent a federal instrumentality—a duly chartered national bank—from functioning at all. It would be difficult to imagine state legislation more clearly in conflict with the Congressional preemption of the field of the organization and chartering of national banks.

B. *THE CONGRESSIONAL PREEMPTION WAS NOT WITHDRAWN BY SECTION 7 OF THE FEDERAL BANK HOLDING COMPANY ACT OF 1956.*

Respondents claim, and the District Court held, that Congress, by enacting Section 7 of the Federal Bank Holding Company Act of 1956, gave the states the power to do what Louisiana has done here. Section 7 reads in its entirety as follows:

> "The enactment by Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies and subsidiaries thereof." 12 U.S.C. § 1846.

It is clear from the face of this section that it neither increased nor reduced preexisting state power, but merely expressed Congress' intention not to preempt entirely the field of bank holding company regulation. Any regulation of bank holding companies which a state could constitutionally undertake before the passage of the Act, it could continue. Any regulation which would previously have been unconstitutional would re-

main so.[35] Congress went out of its way to make this altogether clear. The Senate Report stated:

> "A great deal of concern has been expressed that section 7 of this bill [12 U.S.C. § 1846] . . . granted new authority and powers to States over national banks in general, and respecting the stocks of national banks in particular. . . .
>
> "In order to clarify the legislative history of section 7, the committee wishes to emphasize that *this Section does not grant any new authority to States over national banks.* The purpose of the section is to preserve to the States those powers which they *now* have in our dual banking system. It is always of uppermost importance in legislation of this nature to preserve the dual system of National and State banks, and section 7 must be viewed in that light." S. Rep. No. 1095, 84th Cong., 2d Sess., pt. 2, at 5 (1956). (Italics added.)[36]

Since Section 1846 simply makes it clear that Congress in 1956 wished neither to expand nor to contract the scope of permissible state regulation, respondents must give some reason *other than* Section 1846 for their contention that the Louisiana statute may constitution-

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[35] *Cf.* Federal Power Commission v. Southern California Edison Co., 376 U.S. 205.

[36] *Cf.* also *Hearings on S. 76 and S. 1118 before the Senate Committee on Banking and Currency*, 83d Cong., 1st Sess., pt. 2, at 144, 204 (1953); *Hearings on S. 76 and S. 1118 before the Senate Committee on Banking and Currency*, 83d Cong., 2d Sess., pt. 3, at 281-86, 311, 658 (1954); *Hearings on S. 880, S. 2350, and H.R. 6227 before a Subcommittee of the Senate Committee on Banking and Currency*, 84th Cong., 1st Sess. 133-34, 136, 299-300, 307, 320-21 (1955).

ally be applied to a national bank in spite of the federal preemption of the field of the chartering and establishment of national banks. This they cannot do.

Whatever may be the permissible range of state regulation of national bank holding companies, it is clear that Louisiana's Section 1003(5) does not fall within this range. The District Court relied upon two state cases upholding state legislation dealing with bank holding companies. *Braeburn Securities Corp. v. Smith*, 15 Ill. 2d 55, 153 N.E.2d 806 (1958), *appeal dismissed*, 359 U.S. 311; *Opinion of the Justices*, 102 N.H. 106, 151 A.2d 236 (1959). These cases involved statutes[37] of a type enacted in a number of states prohibiting, from the effective date of the statute, (1) the organization of any new bank holding companies, and (2) any additional acquisitions of bank stock by existing bank holding companies. Indeed, this was the nature of Louisiana Act 275 as originally introduced. Although the Illinois and New Hampshire decisions are by no means immune from attack insofar as the statutes sustained by them affect the ownership of stock in national banks,[38] they need not be passed upon here

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[37] The New Hampshire case was an advisory opinion, and the legislation only proposed.

[38] Neither state court focused on the question whether a state attempt to regulate the ownership of stock of national banks violates the Supremacy Clause because of the "complete system for the establishment and government of National Banks" contained in the National Bank Act. Deitrick v. Greaney, 309 U.S. 190, 194. Any disposition of this question would require consideration of cases holding that REV. STAT. § 5139 (1875), 12 U.S.C. § 52, which provides for transferability of national bank stock, prevails over provisions of state law that restrict such transferability. *E.g.*, McClellan v. Merchants' & Miners' Nat'l Bank, 77 Colo. 302, 236 Pac. 774 (1925); see Scott v. Pequonnock Nat'l Bank, 15 Fed.

because, contrary to the District Court's statement that the statutes involved were "similar" to the Louisiana statute (R. 437, 211 F. Supp. at 578), the eleventh-hour amendment adding Section 1003(5) is an assertion by Louisiana of a wholly different and unique type of jurisdiction.

Whereas the statutes approved by the Illinois and New Hampshire courts prohibit future acquisitions of bank stock by new or existing bank holding companies, Louisiana's Section 1003(5) attempts to prohibit an already chartered and existing national bank from doing business because, prior to the enactment of the statute, a holding company had acquired an interest in its stock. Section 1003(5) represents a unique departure in that its impact is not on the stockholders of a bank, who may be subject to the state's jurisdiction, but on a national bank itself, which as far as all essentials of its opening and operation are concerned is not subject to the state's jurisdiction. On analysis, it is no different from a state statute purporting to require the closing of an operating national bank because of a new state legislative determination disapproving of the owner-

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494 (S.D.N.Y. 1883); Equitable Life Assurance Society v. Moore, 29 F. Supp 179 (E.D. Ill. 1939).

Although the Illinois court in *Braeburn* stated correctly that in the Federal Bank Holding Company Act "Congress did not manifest an intent to preempt the legislative field" (153 N.E. 2d at 810), the court gave no consideration to whether the National Bank Act preempted the field of the regulation of stock ownership of national banks. An examination of the papers on file at this Court shows that the appellant did not urge the applicability of the National Bank Act. See Statement as to Jurisdiction and Briefs, U.S. Supreme Court, October Term 1958, No. 718. The dismissal of the appeal by this Court thus cannot be construed as an expression of opinion on the merits of that question.

sh.p of its stock, for example, on the ground that more than a certain percentage is owned by a religious or a labor organization. Whether or not the state could require the stockholder to divest itself of its interest in the bank, it would be absurd to suggest that it could require the bank to close its doors unless the stock was disposed of. Such a result would, however, follow from a decision sanctioning Louisiana's Section 1003(5).[39]

To be sure, a state might in some circumstances be able to achieve the same practical result by forbidding a holding company to own stock in a bank as by forbidding the bank to operate so long as its stock is owned by a holding company. But this would not be so in all cases. For example, a number of bank holding companies own stock in national banks located in stafes other than those in which such bank holding companies are incorporated or do business. In such a situation the state where the bank is located has no jurisdiction over the bank holding company and could certainly not require it to divest itself of its national bank stock. Thus the types of attempted state regulation involved are by no means identical.

The substantial and practical differences between genuine holding company regulation and Section 1003(5) are well illustrated by the facts of the present case. If Louisiana had enacted a statute regulating

[39] Moreover, Section 1003(5) would prevent a national bank from opening without regard to the rights of the majority shareholders if a minority of, say, 30 per cent of its stock were owned by a bank holding company. This is a very different matter from a possibly constitutional requirement that the holding company dispose of its 30 per cent stock interest, which would affect neither the business operations of the bank nor the rights of the majority shareholders.

bank holding companies—a statute forbidding new acquisitions by bank holding companies, or even a statute requiring divestiture of prior-acquired stock—the Comptroller could and would have granted his certificate here, and Whitney-Jefferson could have opened. The attempted state regulation of the stock ownership of the bank, and the constitutionality of such regulation, would be a matter between the state and the bank holding company. The bank would be open for business; the state's attempt to regulate its ownership would have no effect on its ability to perform the functions for which it was chartered by the Federal Government, and it would be performing those functions today. Thus the difference between bank holding company regulation and what Louisiana has done here could not possibly be greater: in the one case the bank would be in operation, and in the other case it is not.

Section 1003(5) as applied in the case at bar is, therefore, not an instance of state regulation of holding companies of the kind that may be sanctioned by 12 U.S.C. § 1846, but an instance of forbidden state regulation of national banks themselves. This is so notwithstanding the possibility that the goal of both types of regulation might be the same. Whether or not a state goal of preventing the ownership of national banks by holding companies is a constitutional goal, and whether or not constitutional means can be found to achieve that goal, Louisiana's Section 1003(5) clearly represents the choice of an unconstitutional means. The statute is vitiated by its attempt to exercise a forbidden direct jurisdiction over national banks in an area that has been preempted by Congress.

C. THE LOUISIANA STATUTE VIOLATES THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT.

As the Court of Appeals recognized, Louisiana's Section 1003(5) "admittedly . . . was passed to prohibit the opening of Whitney-Jefferson" (R. 460, 116 U.S. App. D.C. at 290, 323 F. 2d at 295). Respondents likewise appear to concede that Section 1003(5) was "hurriedly passed to prohibit the new [Whitney] holding company" (R. 428).

Section 1003(5) was first introduced in the Louisiana legislature on June 27, 1962—eighteen days after the complaint was filed in this action—as an amendment to a bill prohibiting the formation of new bank holding companies and new acquisitions of bank stock by existing bank holding companies (R. 151-57, 207, 314). As originally drafted, the pending bill, House Bill No. 1221, would not have affected Whitney Holding Corporation's ownership of Whitney-Jefferson, which was already an existing fact, or the right of Whitney-Jefferson to open for business upon receiving proper authorization from the federal authorities.

The "class" of banks covered by the amendment has only a single member—Whitney-Jefferson. Since at all times since the amendment was introduced Whitney-Jefferson has been the only existing bank holding company subsidiary in Louisiana not open for business, and since the other sections of the act prohibit the creation of new subsidiaries, the "class" can never have another member. Section 1003(5) was originated by John Oulliber, President of the National Bank of Commerce of New Orleans, Whitney-New Orleans' principal competitor, which, as pointed out at page 5, *supra*, has an affiliate bank

in Jefferson Parish (R. 149). It was sponsored and advocated by a small group of bankers comprising the management of the National Bank of Commerce and of the Bank of New Orleans and Trust Company, respondent here (R. 149). It was recognized during the debate in the legislature that the sole purpose of the amendment was to destroy Whitney-Jefferson.[40]

But for the commencement of this action a few days earlier by one of the banks sponsoring this amendment and others, Whitney-Jefferson would, as shown at page 8, *supra*, already have opened for business before the legislation designed to thwart it could be rushed through the legislature. The Comptroller had voluntarily withheld issuance of his certificate of authority after the complaint was filed, and on June 27, 1962, the very day the amendment was introduced, he was enjoined from issuing it by a temporary restraining order which was followed by a preliminary injunction (R. 176-77, 272-73). The amendment was then quickly adopted by the legislature as part of the general holding company bill which was enacted into law as Louisiana Act 275 of 1962 on July 10, 1962. Having been certified by the Governor as "emergency" legislation, the act, including Section 1003(5), became effective on the same day (R. 290, 296, 301), while the preliminary injunction was still keeping Whitney-Jefferson's doors shut.

Having failed to contest the Whitney program—

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[40] There is no official report of the debates in the Louisiana legislature. The best sources for these debates are contemporaneous newspaper reports. See New Orleans States-Item, June 28, 1962, § 1, p. 6, col. 1; New Orleans Times-Picayune, June 28, 1962, § 1, p. 14, col. 1; New Orleans States-Item, July 5, 1962, § 1, p. 2, col. 4; and New Orleans Times-Picayune, July 5, 1962, § 1, p. 22, col. 1.

which had been a matter of public record for many months—before the Federal Reserve Board, respondents and their allies nonetheless at the eleventh hour contrived to prevent implementation of that program by ingenious manipulation of the federal judicial and state legislative systems. By procuring temporary restraints on the basis of an unmeritorious claim that violation of the federal branch banking law was threatened, they gained time to manufacture an *ad hoc* state statute designed permanently to foreclose the implementation of the program without reference to the federal branch banking law (R. 253, 271-72, 128). Had Whitney-Jefferson not been restrained by the temporary orders improvidently granted in this action—improvidently granted because respondents' contention on the merits of the "branch" issue was palpably erroneous—the entire maneuver would have failed.

If Louisiana had arbitrarily singled out Whitney-Jefferson for specific mention in Section 1003(5), there would of course be no question that the statute was unconstitutional. See *Morey v. Doud*, 354 U.S. 457. Since its purpose to penalize Whitney-Jefferson is clear, the fact that the statute is superficially couched in general regulatory terms cannot save it. *Cotting v. Kansas City Stock Yards Co.*, 183 U.S. 79, 102-03, 112, 114-15; see *McFarland v. American Sugar Refining Co.*, 241 U.S. 79, 85-87. Even if constitutional on its face, legislation must fall when it is shown to be directed towards a discriminatory or otherwise unconstitutional objective. *E.g., Gomillion v. Lightfoot*, 364 U.S. 339; *Griffin v. School Board of Prince Edward County*, 377 U.S. 218; *Bush v. Orleans Parish School Board*, 188 F. Supp. 916 (E.D. La. 1960), *aff'd per curiam*, 365 U.S. 569; *Bush v. Orleans Parish School Board*, 191 F.

Supp. 871 (E.D. La. 1961), *aff'd per curiam*, 367 U.S. 908. Even if Section 1003(5) were otherwise constitutional, the state, by lending its power to this devious scheme to destroy Whitney-Jefferson, denied petitioner the equal protection of the laws and deprived it of property without due process of law, in violation of the Fourteenth Amendment to the Constitution.

As already demonstrated, the temporary restraining order and preliminary injunction were improvidently granted, since respondents' cause of action on the "branch" issue was clearly without merit. In addition, these orders were wrongfully issued because no possibility of irreparable injury to the respondents was shown. Counsel for petitioner expressly stated that petitioner was willing to commit itself to closing and dissolving the Jefferson Parish bank if respondents should ultimately prevail on the merits (R. 187-88, 265-66). That commitment precluded any possibility that respondents could be injured by the opening of the bank. If it should now be held that the Louisiana statute is constitutional, then it is petitioner that would suffer irreparable injury from the granting of the temporary orders, unless this Court now makes petitioner whole by restoring it to the status quo as of the times those orders were entered—that is, by permitting Whitney-Jefferson to open for business without regard to the Louisiana statute, which at those times was not law. The case is governed by the familiar rule that a preliminary injunction should not be granted unless the party seeking it can show irreparable injury, particularly if to grant the injunction would work irreparable injury upon the other party. See, *e.g.*, *Yakus v. United States*, 321 U.S. 414, 439-40.

The case is, therefore, a proper one for this Court

to apply the general principle of equity stated in *Arkadelphia Co. v. St. Louis S.W. Ry.*, 249 U.S. 134, 145-46: "It is one of the equitable powers, inherent in every court of justice so long as it retains control of the subject matter and of the parties, to correct that which has been wrongfully done by virtue of its process." As already demonstrated, Whitney-Jefferson was fully entitled to open for business at the times the temporary restraining order and the preliminary injunction were improvidently issued. This Court can and should restore Whitney-Jefferson to that position, both because the Louisiana statute is unconstitutional and because that statute would never have applied to Whitney-Jefferson had it not been for the wrongful action of the District Court for the District of Columbia. Even if the Louisiana statute were otherwise constitutional, the Court should hold it ineffective to prevent the opening of Whitney-Jefferson because of the means by which and the purposes for which it was adopted, and in the exercise of the Court's equitable power to redress the wrong done to petitioner by the abuse of the process of a lower federal court.

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals should be reversed and the case remanded to the District Court with instructions to enter summary judgment for the petitioners. If the Court should hold that, despite the impossibility of operating two national banks as though they were one, whether Whitney-New Orleans intended so to operate them is the controlling issue, then the case should be remanded to the District Court for trial.

Respectfully submitted.

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APPENDIX A

STATUTES INVOLVED

1. *CONSTITUTION OF THE UNITED STATES, ARTICLE VI, CLAUSE 2*

This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

2. *CONSTITUTION OF THE UNITED STATES, ARTICLE XIV OF AMENDMENT, SECTION 1*

. . . No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. *NATIONAL BANK ACT, REV. STAT. §§ 5133, 5134, 5135, 5136, 5168, 5169, 5155, 5144, 5202, 5239 (1875); AS AMENDED, 12 U.S.C. §§ 21, 22, 23, 24, 26, 27, 30(c), 36(f), 61, 82, 84, 93 (1958), AS AMENDED, 12 U.S.C. §§ 24, 26, 61, 82, 84 (SUPP. V, 1959-63).*

§ 21. Formation of national banking associations; incorporators; articles of association.

Associations for carrying on the business of banking under this chapter may be formed by any number of natural persons, not less in any case than five. They shall enter into articles of association, which shall specify in general terms the object for which the association is formed, and may contain any other provisions, not inconsistent with law, which the association may see fit to adopt for regulation of its business and the conduct of its affairs. These articles shall be signed by the persons uniting to form the association, and a copy of them shall be forwarded to the Comptroller of the Currency, to be filed and preserved in his office.

§ 22. Organization certificate.

The persons uniting to form such an association shall, under their hands, make an organization certificate, which shall specifically state:

First. The name assumed by such association; which name shall include the word "national" and be subject to the approval of the Comptroller of the Currency.

Second. The place where its operations of discount and deposit are to be carried on, designating the State, Territory, or District, and the particular county and city, town, or village.

Third. The amount of capital stock and the number of shares into which the same is to be divided.

Fourth. The names and places of residence of the shareholders and the number of shares held by each of them.

Fifth. The fact that the certificate is made to enable such persons to avail themselves of the advantages of this chapter.

§ 23. Acknowledgment and filing of certificate.

The organization certificate shall be acknowledged before a judge of some court of record, or notary public; and shall be, together with the acknowledgment thereof, authenticated by the seal of such court, or notary, transmitted to the Comptroller of the Currency, who shall record and carefully preserve the same in his office.

§ 24. Corporate powers of associations.

Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—. . . . [There follow eight paragraphs of corporate powers.]

. . . . .

§ 26. Comptroller to determine if association can commence business.

Whenever a certificate is transmitted to the Comptroller of the Currency, as provided in this chapter, and the association transmitting the same notifies the comptroller that

all of its capital stock has been duly paid in, and that such association has complied with all the provisions of this chapter required to be complied with before an association shall be authorized to commence the business of banking, the comptroller shall examine into the condition of such association, ascertain especially the amount of money paid in on account of its capital, the name and place of residence of each of its directors, and the amount of the capital stock of which each is the owner in good faith, and generally whether such association has complied with all the provisions of this chapter required to entitle it to engage in the business of banking; and shall cause to be made and attested by the oaths of a majority of the directors, and by the president or cashier of the association, a statement of all the facts necessary to enable the comptroller to determine whether the association is lawfully entitled to commence the business of banking.

§ 27. Certificate of authority to commence banking.

If, upon a careful examination of the facts so reported, and of any other facts which may come to the knowledge of the comptroller, whether by means of a special commission appointed by him for the purpose of inquiring into the condition of such association, or otherwise, it appears that such association is lawfully entitled to commence the business of banking, the comptroller shall give to such association a certificate, under his hand and official seal, that such association has complied with all the provisions required to be complied with before commencing the business of banking, and that such association is authorized to commence such business. But the comptroller may withhold from an association his certificate authorizing the commencement of business, whenever he has reason to suppose that the shareholders have formed the same for any other than the legitimate objects contemplated by this chapter.

* * * * *

§ 36. Branch Banks.

"The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following: . . .

* * * *

(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. . . .

* * * *

(f) The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent. . . .

§ 61. Right of shareholders to vote; holding company affiliates; voting permits.

In all elections of directors, each shareholder shall have the right to vote the number of shares owned by him for as many persons as there are directors to be elected, or to cumulate such shares and give one candidate as many votes as the number of directors multiplied by the number of his shares shall equal, or to distribute them on the same principle among as many candidates as he shall think fit; and in deciding all other questions at meetings of shareholders, each shareholder shall be entitled to one vote on each share of stock held by him; except that . . . (4) shares controlled by any holding company affiliate of a national bank shall not be voted unless such holding company affiliate shall have first obtained a voting permit as hereinafter provided, which permit is in force at the time such shares are voted, but such holding company affiliate may, without obtaining such permit, vote in favor of placing the association in voluntary liquidation or taking any other action pertaining to the voluntary liquidation of such association. . . .

For the purposes of this section shares shall be deemed to be controlled by a holding company affiliate if they are owned or controlled directly or indirectly by such holding company affiliate, or held by any trustee for the benefit of the shareholders or members thereof.

Any such holding company affiliate may make application to the Board of Governors of the Federal Reserve System for a voting permit entitling it to vote the stock controlled by it at any or all meetings of shareholders of such bank or authorizing the trustee or trustees holding the stock for its benefit or for the benefit of its share holders so to vote the same. The Board of Governors of the Federal Reserve System may, in its discretion, grant or withhold such permit as the public interest may require. In acting upon such application, the Board shall consider the financial condition of the applicant, the general character of its management, and the probable effect of the granting of such permit upon the affairs of such bank, but no such permit shall be granted except upon the following conditions:

(a) Every such holding company affiliate shall, in making the application for such permit, agree (1) to receive, on dates identical with those fixed for the examination of banks with which it is affiliated, examiners duly authorized to examine such banks, who shall make such examinations of such holding company affiliate as shall be necessary to disclose fully the relations between such banks and such holding company affiliate and the effect of such relations upon the affairs of such banks, such examinations to be at the expense of the holding company affiliate so examined; (2) that the reports of such examiners shall contain such information as shall be necessary to disclose fully the relations between such affiliate and such banks and the effect of such relations upon the affairs of such banks; (3) that such examiners may examine each bank owned or controlled by the holding company affiliate, both individually and in conjunction with other banks owned or controlled by such holding company affiliate; and (4) that publication of individual or consolidated statements of condition of such banks may be required;

(b) After five years after June 16, 1933, every such holding company affiliate (1) shall possess, and shall continue to possess during the life of such permit, free and

clear of any lien, pledge, or hypothecation of any nature, readily marketable assets other than bank stock in an amount not less than 12 per centum of the aggregate par value of all bank stocks controlled by such holding company affiliate, which amount shall be increased by not less than 2 per centum per annum of such aggregate par value until such assets shall amount to 25 per centum of the aggregate par value of such bank stocks; and (2) shall reinvest in readily marketable assets other than bank stock all net earnings over and above 6 per centum per annum on the book value of its own shares outstanding until such assets shall amount to such 25 per centum of the aggregate par value of all bank stocks controlled by it;

(c) Notwithstanding the foregoing provisions of this section, after five years after June 16, 1933, (1) any such holding company affiliate the shareholders or members of which shall be individually and severally liable in proportion to the number of shares of such holding company affiliate held by them respectively, in addition to amounts invested therein, for all statutory liability imposed on such holding company affiliate by reason of its control of shares of stock of banks, shall be required only to establish and maintain out of net earnings over and above 6 per centum per annum on the book value of its own shares outstanding a reserve of readily marketable assets in an amount of not less than 12 per centum of the aggregate par value of bank stocks controlled by it, and (2) the assets required by this section to be possessed by such holding company affiliate may be used by it for replacement of capital in banks affiliated with it and for losses incurred in such banks, but any deficiency in such assets resulting from such use shall be make up within such period as the Board of Governors of the Federal Reserve System may by regulation prescribe and the provisions of this subsection, instead of subsection (b) of this section, shall apply to all holding company affiliates with respect to any shares of bank stock owned or controlled by them as to which there is no statutory liability imposed upon the holders of such bank stock. . . .

. . . .

(e) Every such holding company affiliate shall, in its application for such voting permit, (1) show that it does not own, control, or have any interest in, and is not partic-

ipating in the management or direction of, any corporation, business trust, association, or other similar organization formed for the purpose of, or engaged principally in, the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail or through syndicate participation, of stocks, bonds, debentures, notes, or other securities of any sort (hereinafter referred to as 'securities company'); (2) agree that during the period that the permit remains in force it will not acquire any ownership, control, or interest in any such securities company or participate in the management or direction thereof; (3) agree that if, at the time of filing the application for such permit, it owns, controls, or has an interest in, or is participating in the management or direction of, any such securities company, it will, within five years after the filing of such application, divest itself of its ownership, control, and interest in such securities company and will cease participating in the management or direction thereof, and will not thereafter, during the period that the permit remains in force, acquire any further ownership, control, or interest in any such securities company or participate in the management or direction thereof; and (4) agree that thenceforth it will declare dividends only out of actual net earnings.

If at any time it shall appear to the Board of Governors of the Federal Reserve System that any holding company affiliate has violated any of the provisions of the Banking Act of 1933 or of any agreement made pursuant to this section, the Board of Governors of the Federal Reserve System may, in its discretion, revoke any such voting permit after giving sixty days' notice by registered mail of its intention to the holding company affiliate and affording it an opportunity to be heard. Whenever the Board of Governors of the Federal Reserve System shall have revoked any such voting permit, no national bank whose stock is controlled by the holding company affiliate whose permit is so revoked shall receive deposits of public moneys of the United States, nor shall any such national bank pay any further dividend to such holding company affiliate upon any shares of such bank controlled by such holding company affiliate.

Whenever the Board of Governors of the Federal Reserve System shall have revoked any voting permit as hereinbefore provided, the rights, privileges, and fran-

chises of any or all national banks the stock of which is controlled by such holding company affiliate shall, in the discretion of the Board of Governors of the Federal Reserve System, be subject to forfeiture in accordance with section 501a of this title.

. . . . . .

§ 82. Limit on indebtedness incurred by bank.

No national banking association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, plus 50 percent of the amount of its unimpaired surplus fund.

. . . . . .

§ 84. Limit of liability of any person to bank.

The total obligations to any national banking association of any person, copartnership, association, or corporation shall at no time exceed 10 per centum of the amount of the capital stock of such association actually paid in and unimpaired and 10 per centum of its unimpaired surplus fund. The term "obligations" shall mean the direct liability of the maker or acceptor of paper discounted with or sold to such association and the liability of the indorser, drawer, or guarantor who obtains a loan from or discounts paper with or sells paper under his guaranty to such association and shall include in the case of obligations of a copartnership or association the obligations of the several members thereof and shall include in the case of obligations of a corporation all obligations of all subsidiaries thereof in which such corporation owns or controls a majority interest.

. . . . . .

§ 93. Violation of provisions of chapter; forfeiture of franchise; personal liability of directors.

If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this chapter, all the rights, privileges, and franchises of the association shall be thereby forfeited

Such violation shall, however, be determined and adjudged by a proper district or Territorial court of the United States in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation.

3. *FEDERAL BANK HOLDING COMPANY ACT OF 1956, C. 240, §§ 3-9, 70 STAT. 133, AS AMENDED, 12 U.S.C. §§ 1841-48 (1958).*

§ 1841. Definitions.

(a) "Bank holding company" means any company (1) which directly or indirectly owns, controls, or holds with power to vote, 25 per centum or more of the voting shares of each of two or more banks or of a company which is or becomes a bank holding company by virtue of this chapter, or (2) which controls in any manner the election of a majority of the directors of each of two or more banks, or (3) for the benefit of whose shareholders or members 25 per centum or more of the voting shares of each of two or more banks or a bank holding company is held by trustees; and for the purposes of this chapter, any successor to any such company shall be deemed to be a bank holding company from the date as of which such predecessor company became a bank holding company. . . .

* * * *

(c) "Bank" means any national banking association or any State bank, savings bank, or trust company, but shall not include any organization operating under sections 611 and 612 of this title, or any organization which does not do business within the United States. "State member bank" means any State bank which is a member of the Federal Reserve System. "District bank" means any State bank organized or operating under the Code of Law for the District of Columbia.

(d) "Subsidiary", with respect to a specified bank holding company, means (1) any company 25 per centum or more of whose voting shares (excluding shares owned by the United States or by any company wholly owned by the

United States) is owned or controlled by such bank holding company; or (2) any company the election of a majority of whose directors is controlled in any manner by such bank holding company; or (3) any company 25 per centum or more of whose voting shares are held by trustees for the benefit of the shareholders or members of such bank holding company.

§ 1842. Acquisition of bank shares or assets.

(a) Prior approval of Board as necessary; exceptions.

It shall be unlawful except with the prior approval of the Board (1) for any action to be taken which results in a company becoming a bank holding company under section 1841 (a) of this title; (2) for any bank holding company to acquire direct or indirect ownership or control of any voting shares of any bank if, after such acquisition, such company will directly or indirectly own or control more than 5 per centum of the voting shares of such bank; (3) for any bank holding company or subsidiary thereof, other than a bank, to acquire all or substantially all of the assets of a bank; or (4) for any bank holding company to merge or consolidate with any other bank holding company. Notwithstanding the foregoing this prohibition shall not apply to (A) shares acquired by a bank, (i) in good faith in a fiduciary capacity, except where such shares are held for the benefit of the shareholders of such bank, or (ii) in the regular course of securing or collecting a debt previously contracted in good faith, but any shares acquired after May 9, 1956 in securing or collecting any such previously contracted debt shall be disposed of within a period of two years from the date on which they were acquired; or (B) additional shares acquired by a bank holding company in a bank in which such bank holding company owned or controlled a majority of the voting shares prior to such acquisition.

. . . . . .

(c) Factors governing determination of application for approval.

In determining whether or not to approve any acquisition or merger or consolidation under this section, the Board shall take into consideration the following factors: (1) the financial history and condition of the company or

companies and the banks concerned; (2) their prospects; (3) the character of their management; (4) the convenience, needs, and welfare of the communities and the area concerned; and (5) whether or not the effect of such acquisition or merger or consolidation would be to expand the size or extent of the bank holding company system involved beyond limits consistent with adequate and sound banking, the public interests, and the preservation of competition in the field of banking.

(d) Limitation by State boundaries.

Notwithstanding any other provision of this section, no application shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside the State in which such bank holding company maintains its principal office and place of business or in which it conducts its principal operations unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication.

1843. Interests in nonbanking organizations.

(a) Ownership or control of voting shares of any company not a bank; engagement in business other than that of banking.

Except as otherwise provided in this chapter, no bank holding company shall—

(1) after May 9, 1956 acquire direct or indirect ownership or control of any voting shares of any company which is not a bank, or

(2) after two years from May 9, 1956 or from the date as of which it becomes a bank holding company, whichever is later, retain direct or indirect ownership or control of any voting shares of any company which is not a bank or a bank holding company or engage in any business other than that of banking or of managing or controlling banks or of furnishing services to or performing services for any bank of which it owns or controls 25 per centum or more of the voting shares.

* * * *

§ 1844. Administration.

(a) Registration of bank holding company.

Within one hundred and eighty days after May 9, 1956, or within one hundred and eighty days after becoming a bank holding company, whichever is later, each bank holding company shall register with the Board on forms prescribed by the Board, which shall include such information with respect to the financial condition and operations, management, and intercompany relationships of the bank holding company and its subsidiaries, and related matters, as the Board may deem necessary or appropriate to carry out the purposes of this chapter. The Board may, in its discretion, extend the time within which a bank holding company shall register and file the requisite information.

(b) Regulations and orders.

The Board is authorized to issue such regulations and orders as may be necessary to enable it to administer and carry out the purposes of this chapter and prevent evasions thereof.

(c) Reports required by Board; examinations; cost of examination.

The Board from time to time may require reports under oath to keep it informed as to whether the provisions of this chapter and such regulations and orders issued thereunder have been complied with; and the Board may make examinations of each bank holding company and each subsidiary thereof, the cost of which shall be assessed against, and paid by, such holding company. The Board shall, as far as possible, use the report of examinations made by the Comptroller of the Currency, the Federal Deposit Insurance Corporation, or the appropriate State bank supervisory authority for the purposes of this section.

(d) Reports to the Congress; recommendations.

Before the expiration of two years following May 9, 1956, and each year thereafter in the Board's annual report to the Congress, the Board shall report to the Congress the results of the administration of this chapter, stating what, if any, substantial difficulties have been encountered in carrying out the purposes of this chapter, and any rec-

ommendations as to changes in the law which in the opinion of the Board would be desirable.

§ 1845. Investments and borrowing by subsidiaries.

(a) Securities of parent holding company or other subsidiary; collateral security; purchase of securities under repurchase agreement; loans; discount or extension of credit.

From and after May 9, 1956, it shall be unlawful for a bank—

(1) to invest any of its funds in the capital stock, bonds, debentures, or other obligations of a bank holding company of which it is a subsidiary, or of any other subsidiary of such bank holding company;

(2) to accept the capital stock, bonds, debentures, or other obligations of a bank holding company of which it is a subsidiary or any other subsidiary of such bank holding company, as collateral security for advances made to any person or company: *Provided, however*; That any bank may accept such capital stock, bonds, debentures, or other obligations as security for debts previously contracted, but such collateral shall not be held for a period of over two years;

(3) to purchase securities, other assets or obligations under repurchase agreement from a bank holding company of which it is a subsidiary or any other subsidiary of such bank holding company; and

(4) to make any loan, discount or extension of credit to a bank holding company of which it is a subsidiary or to any other subsidiary of such bank holding company.

Non-interest-bearing deposits to the credit of a bank shall not be deemed to be a loan or advance to the bank of deposit, nor shall the giving of immediate credit to a bank upon uncollected items received in the ordinary course of business be deemed to be a loan or advance to the depositing bank.

(b) Exemptions.

The provisions of this section shall not apply (1) to the capital stock, bonds, debentures, or other obliga-

tions of any company described in section 1843(c)(1) of this title, or (2) to any company whose subsidiary status has arisen out of a bona fide debt to the bank contracted prior to the date of the creation of such status, or (3) to any company whose subsidiary status exists by reason of the ownership or control of voting shares thereof by the bank as executor, administrator, trustee, receiver, agent, or depository, or in any other fiduciary capacity, except where such shares are held for the benefit of all or a majority of the stockholders of such bank.

* * * *

§ 1847. Penalties.

Any company which willfully violates any provision of this chapter, or any regulation or order issued by the Board pursuant thereto, shall upon conviction be fined not more than $1,000 for each day during which the violation continues. Any individual who willfully participates in a violation of any provision of this chapter shall upon conviction be fined not more than $10,000 or imprisoned not more than one year, or both. Every officer, director, agent, and employee of a bank holding company shall be subject to the same penalties for false entries in any book, report, or statement of such bank holding company as are applicable to officers, directors, agents, and employees of member banks for false entries in any books, reports, or statements of member banks under section 1005 of Title 18.

§ 1848. Judicial review.

Any party aggrieved by an order of the Board under this chapter may obtain a review of such order in the United States Court of Appeals within any circuit wherein such party has its principal place of business or in the Court of Appeals in the District of Columbia, by filing in the court, within sixty days after the entry of the Board's order, a petition praying that the order of the Board be set aside. A copy of such petition shall be forthwith transmitted to the Board by the clerk of the court, and thereupon the Board shall file in the court the record made before the Board, as provided in section 2112 of Title 28. Upon the filing of such petition the court shall have jurisdiction to

affirm, set aside, or modify the order of the Board and to require the Board to take such action with regard to the matter under review as the court deems proper. The findings of the Board as to the facts, if supported by substantial evidence, shall be conclusive.

5. *CHAPTER 12, TITLE 6, LOUISIANA REVISED STATUTES (CODIFIED FROM LOUISIANA ACT 275 OF 1962)*

[the section numbers in brackets indicate sections of Act 275 of 1962]

AN ACT

To define the bank holding company, to prohibit the formation of new bank holding companies, and to control the future expansion of existing bank holding companies and of their subsidiaries. [This is the title of the statute as enacted; the title was not codified.]

[§ 1] § 1001. Declaration of policy.

It is declared to be the policy of this State to protect and to foster the growth of the independent unit bank, and [sic] institution whose ownership and origins are grounded in the local community and whose activities are bound up with local economic and social organizations; to prevent the undesirable concentration of control in the banking field to the detriment of the public interest; to insure effective competition among all banking institutions; and, to accomplish these objectives by prohibiting the formation of new banking holding companies and the acquisition of control by whatever means of additional banking institutions by existing bank holding companies and by their subsidiaries.

[§ 2] § 1002. Definitions.

(A) "Bank holding company" means any company, foreign or domestic, including a bank,

(1) which directly or indirectly owns, controls, or holds with power to vote, 25 per centum or more of the voting shares of any bank, or

(2) which controls in any manner the election of a majority of the directors of any bank, or

(3) for the benefit of whose shareholders or members 25 per centum or more of the voting shares of any bank or a bank holding company is held by trustees; and for the pur-

poses of this Chapter, any successor to any such company shall be deemed to be a bank holding company from the date as of which such predecessor company became a bank holding company.

(B) Notwithstanding the foregoing,

(1) no company shall be a bank holding company by virtue of its ownership or control of shares acquired by it in connection with its underwriting of securities and which are held only for such period of time as will permit the sale thereof upon a reasonable basis, and

(2) no company formed for the sole purpose of participating in a proxy solicitation shall be a bank holding company by virtue of its control of voting rights of shares acquired in the course of such solicitation.

(3) nor shall this Chapter apply to shares acquired by a bank holding company which is a bank, or by any banking subsidiary of a bank holding company, in satisfaction of a debt previously contracted in good faith, but such bank holding company or such subsidiaries shall dispose of such shares within a period of two years from the date on which they were acquired or from the date of enactment of this Chapter, whichever is later.

(4) nor shall this chapter apply to shares which are held or acquired by a bank holding company which is a bank or by any banking subsidiary of a bank holding company, in good faith in a fiduciary capacity; except where such shares are held for the benefit of the shareholders of such bank holding company or any of its subsidiaries, or to shares which are of the kinds and amounts eligible for investment by National banking associations under provisions of 12 U.S.C.A. §24, or to shares lawfully acquired and owned prior to the date of enactment of this chapter by a bank which is a bank holding company, or by any of its wholly owned subsidiaries.

(C) "Company" means any corporation, business trust, partnership, association, or similar organization doing business in this State, but shall not include any corporation the majority of the shares of which are owned by the United States or by any State.

(D) "Bank" means any commercial bank, savings bank, trust company or similar organization doing business in this State.

(E) "Subsidiary", with respect to a specified bank holding company, means

(1) any company 25 per centum or more of whose voting shares (excluding shares owned by the United States or by any company wholly owned by the United States) is owned or controlled by such bank holding company; or

(2) any company the election of a majority of whose directors is controlled in any manner by such bank holding company; or

(3) any company 25 per centum or more of whose voting shares are held by trustees for the benefit of the shareholders or members of such bank holding company.

(F) The term "successor" includes any company which acquires directly or indirectly from a bank holding company shares of any bank, when and if the relationship between such company and the bank holding company is such that the transaction effects no substantial change in the control of the bank or beneficial ownership of such shares of such bank.

[§ 3] § 1003. Prohibitions upon acquisition of bank shares or assets.

It shall be unlawful:

(1) for any action to be taken which results in a company or a bank becoming a bank holding company as defined in this Chapter;

(2) for any bank holding company or subsidiary thereof to acquire direct or indirect ownership or control of any voting shares of any bank if, after such acquisition, such company or subsidiary will directly or indirectly own or control more than 25 per centum of the voting shares of such bank;

(3) for any bank holding company or subsidiary thereof to acquire all or substantially all of the assets of a bank; or

(4) for any bank holding company or subsidiary thereof to merge or consolidate with any other bank holding company or any subsidiary thereof;

(5) for any bank holding company or subsidiary thereof to open for business any bank not now opened for business, whether or not, a charter, permit, license or certificate to open for business has already been issued. Notwithstanding

the foregoing, this prohibition shall not apply to additional shares acquired by a bank holding company in a bank in which such bank holding company owned or controlled a majority of the voting shares prior to such acquisition.

[§ 4] § 1004. Penalties.

Any bank, bank holding company, company, or any subsidiary of any of them which willfully violates any provision of this Chapter, or any regulation or order issued by the State Bank Commissioner pursuant thereto, shall upon conviction be fined not less than $500 nor more than $1,000 for each day during which the violation continues. Any individual who willfully participates in a violation of any provision of this Chapter shall upon conviction be fined not less than $1,000 nor more than $5,000 or imprisoned not more than one year, or both.

[§ 5] § 1005. Administration.

The State Bank Commissioner shall administer and carry out the provisions of this Chapter and may issue such regulations and orders as may be necessary to discharge this duty and to prevent evasions of the Chapter.

[§ 6] § 1006. Savings clause.

Nothing herein contained shall be interpreted or construed as approving any act, action, or conduct which is or has been or may be in violation of any existing law, nor shall anything herein contained constitute a defense to any action, suit or proceeding pending or hereafter instituted on account of any prohibited antitrust or monopolistic act, action, or conduct.

APPENDIX B

ILLUSTRATIVE COMMENTS OF REGULATORY AGENCIES AND SCHOLARS ON THE DEVELOPMENT AND ROLE OF BANK HOLDING COMPANIES

"In the absence of laws permitting branch banking there has been in certain sections a considerable development of so-called chain banks, banks owned or controlled in groups by individuals or by holding companies." FED. RESERVE BD. ANN. REP. 6 (1921).

"Such companies [bank holding companies] have been organized in increasing numbers to operate extensively in the field of banking . . . to acquire control of corporately independent banking institutions . . . and to exercise this centralized control . . . in building up . . . particularly in states which do not permit branch banking . . . chain systems. . . . In some respects the control exercised through stock ownership of a group of banks operated as a system is similar to that exercised by a parent bank over its branch offices." FED. RESERVE BD. ANN. REP. 31 (1927).

"Notwithstanding the technical restrictions in the law against the establishment of branches in the country districts by banks in the cities, there has developed since the McFadden Act a new form of branch banking which appears to be without legal objection. . . . A central financial corporation acquires the controlling interest in the stock of a number of banks, one of which is a metropolitan bank around which the others are grouped. Although technically each bank in the group is a separate corporation operating with a local board of directors, practically each member of the group depends upon a central management which controls the banking policy of the group. The financial responsibility of the central ownership and management is the main support of the group." Address of John W. Pole, Comptroller of the Currency, before the annual convention of the American Bankers Association, 1929, set forth in WILLIT, CHAIN, GROUP AND BRANCH BANKING 162-63 (1930).

"If the laws permitted the establishment of branches in the country districts by these banks, group banking would disappear and the country districts would be able to do business directly with strong city banks." *Id.* at 163.

"While chain and group banking developments have not been generally restricted by provisions in State banking

codes, the area within which these developments have been relatively more considerable in extent is composed largely of states which have prohibited the establishment of branch banking offices—as, for example, in Minnesota, North Dakota, Kansas, Iowa, Illinois, Oklahoma, and Texas." FED. RESERVE BULL., April 1930, set forth in WILLIT, *op. cit. supra* at 144.

"Unlike manufacturers or retailers, bankers could not establish branches except to a very limited extent. Branch banking, except within city limits, is, generally speaking, prohibited by the national bank act and by the laws of most states. The ownership of stock control of one bank by another is likewise forbidden. Therefore, to accoinplish the same results that industry had reached by means of consolidations and branches, group banking developed almost overnight, as an entirely new form of banking development." Statement of George F. Rand, President of the Marine Midland Corporation, set forth in WILLIT, *op. cit. supra* at 200.

"We were compelled to carry out our plans by the method of 'group banking' because as already intimated, the laws of New York State and the National Bank Act both prohibit branch banking beyond city limits. It is, therefore, somewhat academic for me to try to compare one system with the other, when only one was open to us." *Id.* at 201.

". . . [A] most significant motive for the increase in the number and activities of bank holding corporations is the desire to circumvent the limitations of Federal and State law in order to be in a position when the necessary laws have been passed to convert into branch banking systems." CARTINHOUR, BRANCH, GROUP AND CHAIN BANKING 129 (1931).

"It has been generally assumed that such developments [the growth of bank holding companies] are in anticipation of extensive legalized branch banking, and are a reaction against statutory provisions pertaining to branch banking under State laws and under the McFadden Act, which forbids the further expansion of branch banking outside city limits by national banks and by State banks which are members of the Federal Reserve System. Undoubtedly

such factors are the most significant motives for group developments. . . ." *Id.* at 120-21.

"The rapid spread and growth of group banking is due in large part to the widespread restrictions on branch banking, which have made resort to some other legal device necessary to effect the purpose." Fordham, *Branch Banks as Separate Entities*, 31 COLUM. L. REV. 975, 976-77 (1931).

"Several cases have existed where the organizers of group systems preferred to establish branches, but the banking laws did not permit them to do so. Under such conditions, the holding company was adopted as a means of accomplishing an end not otherwise possible." CHAPMAN, CONCENTRATION OF BANKING 352 (1934).

"As already mentioned briefly, many group banking systems were organized as a result of legislation in several states prohibiting or rigidly restricting within specific limits the establishment of branches. The organizers apparently, in many cases, hit upon the group system as an alternative—as the next best policy to the setting up of branches. They saw that the holding company, a well-known vehicle in other branches of industry and finance, could be readily applied in banking. In some cases branches were extended where possible within circumscribed areas and a group of separate units acquired to supplement the branches. This policy was followed in California and in Washington where the Marine Bancorporation of Seattle, for example, definitely announced its intention of converting individual units into branches when and where possible." CHAPMAN & WESTERFIELD, BRANCH BANKING 323-24 (1942).

"Unquestionably, group banking has assumed a more important role in this country than elsewhere because of the limitations placed upon branch banking, and it is likely to remain an important type of interbank relation until such time as a major relaxation occurs in the restrictions and prohibitions imposed upon the development of branch systems." LAMB, GROUP BANKING 9 (1961).

"In the closing years of the 1920's, when the opposition to branch systems had reached its peak, the holding company approach to banking concentration began to emerge

in considerable strength in certain sections of the country." *Id.* at 38.

"It is true that most of the group systems originated in those states which placed legal restrictions upon branch banking, though the movement was not limited to these locations. In the former situation they were unquestionably instituted as an alternative plan to achieve some of the advantages of branch banking." *Id.* at 86.

"The holding company form of organization offered the only means of combining control of banks to realize some of the benefits of mergers where branch banking is not permitted or severely limited." NADLER & BOGEN, THE BANK HOLDING COMPANY 10 (1959).

"One can state with a high degree of confidence that if the United States had followed the pattern of the other leading commercial nations and had established nationwide (or even trade-area) branch banking, there would be few, if any, bank holding companies; today, instead of having unit, branch, chain, and group banks, this country would probably enjoy a much more conventional banking system." FISCHER, BANK HOLDING COMPANIES 1 (1961).

"Restrictions on branch banking encouraged the formation of groups for two related reasons. The first was the bankers' expectation that the restrictions would be relaxed and through the use of the holding company they could develop 'ready-made' branch systems in preparation for that event. The second was that while these limitations on branch banking were in effect, business expanded and customers moved to the suburbs and the urban banker often had no other way to follow them." *Id.* at 23.

"Therefore, in sections where branch banks could not be established and investors felt that the formation of a system of banks was economically justified, they have attempted, within the limits of the law, to obtain the desired representation by using some other form of organization. In the states which did not forbid or severely restrict the bank holding company, such a system has frequently been selected as the ideal means of accomplishing the objective." *Id.* at 138.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement:	
1. The underlying facts	3
2. Administrative proceedings	7
3. Judicial proceedings against the Federal Reserve Board in the Fifth Circuit	9
4. Judicial proceedings against the Comptroller (the instant cases)	10
Summary of argument	14
Argument	19
I. The district court was without jurisdiction to consider objections of competitor banks to the operation of a national bank by a bank holding company	19
A. The objections raised by the respondents to the opening of Whitney-Jefferson are based upon its ownership by a bank holding company and could therefore have been asserted as grounds for denial of the Federal Reserve Board's consent to the acquisition of Whitney-Jefferson by Whitney Holding Corporation	22
B. The Bank Holding Company Act of 1956 and its legislative history establish that a decision of the Federal Reserve Board authorizing an acquisition was not to be subject to later review by the Comptroller or by a Federal district court in a suit against the Comptroller	26

742-143—64——1

Argument—Continued
I. The district court, etc.—Continued
C. Established principles requiring exhaustion of administrative remedies and the use of statutory review procedures confirm the view that the proceedings authorized by the Bank Holding Company Act are exclusive ..... Page 29
D. Competitors lack standing to challenge the Comptroller's approval of the opening of a new national bank 36
II. The branch-banking restrictions of the Banking Act of 1933 are not applicable to separately chartered banks owned by a bank holding company 40
A. Congress has long recognized the substantial differences between branch banking and the operations of a bank holding company system 41
B. In enacting the Banking Act of 1933 and the Bank Holding Company Act, Congress deliberately chose to make the geographical restrictions on branch banking inapplicable to separately chartered banks owned or controlled by bank holding companies 46
1. The Banking Act of 1933 47
2. The Bank Holding Company Act of 1956 51
C. Congress intended to free all bank holding company systems from any limitations imposed by State law on the location of branch offices and to impose, instead, a wholly federal system of regulation .. 58
III. The Louisiana statute prohibiting the operation of bank holding companies does not provide a basis for affirmance 64
A. A district court suit against the Comptroller of the Currency is not the proper forum for determining the validity of a State law prohibiting the opening of a national bank by a bank holding company 65

Argument—Continued
III. The Louisiana statute, etc.—Continued
B. A State statute prohibiting the opening of a national bank owned by a bank holding company is not authorized by the Bank Holding Company Act, and is in conflict with the National Bank Act ... Page 69
Conclusion ... 75
Appendix A ... 76
Appendix B ... 88

CITATIONS

Cases:
Aircraft & Diesel Corp. v. *Hirsch*, 331 U.S. 752 ... 30, 32
Alabama Power Co. v. *Ickes*, 302 U.S. 464 ... 39
Braeburn Securities Corp. v. *Smith*, 15 Ill. 2d 55, 153 N.E. 2d 806, appeal dismissed, 359 U.S. 311 ... 74
Callanan Road Improvement Co. v. *United States*, 345 U.S. 507 ... 30, 32, 35
City of Tacoma v. *Taxpayers of Tacoma*, 357 U.S. 320 ... 15, 32, 33, 34, 35, 66, 67
Cook County National Bank v. *United States*, 107 U.S. 445 ... 70
Davis v. *Elmira Savings Bank*, 161 U.S. 275 ... 71
Deitrick v. *Greaney*, 309 U.S. 190 ... 70
Easton v. *Iowa*, 188 U.S. 220 ... 71
Far East Conference v. *United States*, 342 U.S. 570 ... 30
Farmers' and Mechanics' Nat. Bank v. *Dearing*, 91 U.S. 29 ... 71
Federal Power Commission v. *Colorado Interstate Gas Co.*, 348 U.S. 492 ... 32
First National Bank v. *California*, 262 U.S. 366 ... 71
First National Bank in Billings v. *First Bank Stock Corp.*, 306 F. 2d 937 ... 61
First National Bank of Smithfield v. *Saxon*, Civ. No. 1460, E.D.N.C. ... 38
First National Bank of St. Louis v. *Missouri*, 263 U.S. 640 ... 47
First Wisconsin Bankshares Corp. v. *Board of Governors*, 325 F. 2d 946 ... 23
Florida v. *Mellon*, 273 U.S. 12 ... 37
Franklin National Bank v. *New York*, 347 U.S. 373 ... 18, 69, 71
Frost v. *Corporation Commission*, 278 U.S. 515 ... 40

Cases—Continued

	Page
Gidney v. *Wayne Oakland Bank*, 252 F. 2d 537, certiorari denied, 358 U.S. 830	37
Jennings v. *U.S. Fidelity & Guaranty Co.*, 294 U.S. 216	71
Lichter v. *United States*, 334 U.S. 742	30
Massachusetts v. *Mellon*, 262 U.S. 477	37
McCulloch v. *Maryland*, 4 Wheat. 316	70
Mercantile National Bank at Dallas v. *Langdeau*, 371 U.S. 555	18, 69, 71
Myers v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41	30, 32, 35
Opinion of the Justices, 151 A. 2d 236	74
Seattle v. *Beezer*, 376 U.S. 224	32, 34, 67
Singer & Sons v. *Union Pacific R. Co.*, 311 U.S. 295	39
Tennessee Electric Power Co. v. *Tennessee Valley Authority*, 306 U.S. 118	39, 40
Texas & Pacific Ry. Co. v. *Abilene Cotton Oil Co.*, 204 U.S. 426	30
United States v. Corrick, 298 U.S. 435	30, 32, 35
Trans-Nebraska Co. (F.R.B. Docket No. BHC-66)	23

Constitution and statutes:

Constitution of the United States, Article VI, cl. 2	72, 76
Act of November 7, 1918, Sec. 1, 40 Stat. 1043, as added, 73 Stat. 460, 12 U.S.C. (Supp. II) 215a(d)	5
Banking Act of 1933 (Act of June 16, 1933, c. 89, 48 Stat. 162 *et seq.*):	
Sec. 2, 12 U.S.C. 221a	49
Sec. 5(c), 12 U.S.C. 337	50
Sec. 13, 12 U.S.C. 371	50
Sec. 19, 12 U.S.C. 61	50, 60
Sec. 20, 12 U.S.C. 377	50, 60
Sec. 23, 12 U.S.C. 36	3, 11, 13, 16, 44, 48, 49, 61, 79
Sec. 27, 12 U.S.C. 161	50, 60
Sec. 28, 12 U.S.C. 481	50, 60
Bank Holding Company Act of 1956 (Pub. L. 511, 84th Cong., 2d Sess., Act of May 9, 1956, c. 240, 70 Stat. 133)	52, 59, 60, 65, 72, 80
Sec. 2, 12 U.S.C. 1841	80
Sec. 3, 12 U.S.C. 1842	8, 19, 22, 23, 24, 25, 27, 57, 58, 61, 62, 81
Sec. 5, 12 U.S.C. 1844	27, 60
Sec. 6, 12 U.S.C. 1845	60, 83
Sec. 7, 12 U.S.C. 1846	18, 19, 64, 65, 72, 73, 84
Sec. 9, 12 U.S.C. 1848	9, 19, 24, 29, 61, 66, 84

Constitution and statutes—Continued
National Bank Act (Act of February 25, 1863), 21 U.S.C. 21, *et seq.*:
Page
R.S. § 5134, 12 U.S.C. 22 ... 47
R.S. § 5136, 12 U.S.C. 24, as amended, 44 Stat. 1228 ... 48, 69, 72, 76
R.S. § 5138, 12 U.S.C. 51 ... 43
R.S. § 5139, 12 U.S.C. 52 ... 77
R.S. § 5140, 12 U.S.C. (Supp. I) 53 ... 43
R.S. § 5145, 12 U.S.C. 71 ... 45
R.S. § 5146, 12 U.S.C. 72 ... 45
R.S. § 5155, as amended, 12 U.S.C. 36 ... 79
R.S. § 5168, 12 U.S.C. 26 ... 18, 67, 72, 78
R.S. § 5169, 12 U.S.C. 27 ... 10, 18, 19, 72, 78
R.S. § 5190, 12 U.S.C. 81 ... 47
R.S. § 5200, 12 U.S.C. 84 ... 44
R.S. § 5202, 12 U.S.C. 82 ... 44
R.S. § 5204, 12 U.S.C. 56 ... 43
R.S. § 5205, 12 U.S.C. 55 ... 43
R.S. § 5220, 12 U.S.C. 181 ... 45
R.S. § 5221, 12 U.S.C. 182 ... 45
R.S. § 5239, 12 U.S.C. 93 ... 45
12 U.S.C. 51–67, 71–78 ... 69
Louisiana Act No. 275 of 1962 ... 11, 12, 13, 17, 18, 64, 71, 85
La. R.S. § 6.54 ... 3
La. R.S. §§ 6.1001–1006 (1963 Supp.) ... 64
La. R.S. § 6.1002 ... 85
La. R.S. § 6.1003 ... 72, 85
Regulations:
Federal Reserve Board Regulation Y:
Sec. 222.4, 12 C.F.R. 222.4 ... 7, 22, 86
Sec. 222.7, 12 C.F.R. 222.7 ... 23, 86
Miscellaneous:
Cartinhour: *Branch, Group and Chain Banking* (1931) ... 42, 47
Chapman: *Concentration of Banking* (1934) ... 42, 47
Chapman and Westerfield: *Branch Banking* (1942) ... 42, 48
Comptroller of the Currency: *Annual Report* (1929) ... 46
76 Cong. Rec. 1998 ... 17, 51
77 Cong. Rec.:
5861 ... 51
5863 ... 51
5892 ... 51

Miscellaneous—Continued Page
101 Cong. Rec. 8187 ..... 29, 53
102 Cong. Rec.:
6750 51
6752 23
6753 ..... 17, 56, 88
6754 ..... 17, 54, 55, 56, 57, 88
6758 ..... 54, 74
6760 ..... 22, 28, 54, 55, 57
6946 ..... 28, 57
6960 57
6964 ..... 28, 57
7161 ..... 28, 57
7165 57
7941 57
8186 27
8187 ..... 27, 29, 53
26 Fed. Reg. 6792 7
26 Fed. Reg. 12312 8
Fischer, *Bank Holding Companies* (1961) 26, 42, 46
Fordham, *Branch Banks as Separate Entities*, 31 Col. L. Rev. 975 (1931) 42
Hearings before the House Committee on Banking & Currency, on "Branch, Chain and Group Banking," 71st Cong., 2d Sess 42, 48
H. Rept. 150, 73d Cong., 1st Sess 51
H. Rept. 609, 84th Cong., 1st Sess 26, 27, 29, 53
H.R. 6227 ..... 27, 29
Lamb, *Group Banking* (1961) 42, 46
New Orleans Times-Picayune:
December 20, 1961, p. 24 8
January 18, 1962, p. 21 8
New Orleans States-Item:
December 20, 1961, p. 7 8
January 17, 1962, p. 17 8
Ostrolenk, *The Economics of Branch Banking* (1930) .. 42
Sen. Rept. 77, 73d Cong., 1st Sess 48, 51
Sen. Rept. 1095, Part I, 84th Cong., 1st Sess 17, 22, 28, 29, 52, 54, 55, 56, 73
Sen. Rept. 1095, Part II, 84th Cong., 2d Sess .. 19, 29, 56, 74
Willit, *Selected Articles on Chain, Group and Branch Banking* (1930) 42, 48

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 26

WHITNEY NATIONAL BANK IN JEFFERSON PARISH,
PETITIONER

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL.

No. 30

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY,
PETITIONER

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER SAXON

OPINIONS BELOW

The opinion of the court of appeals (R. 454–477) is reported at 323 F. 2d 290. The opinion of the district court (R. 435–438) is reported at 211 F. Supp. 576.

JURISDICTION

The judgments of the court of appeals were entered on August 14, 1963 (R. 478). Timely petitions for rehearing *en banc* were denied on October 17, 1963 (R. 479). The petition for a writ of certiorari in No. 26 was filed on January 15, 1964. By order dated January 9, 1964, the Chief Justice extended the time for filing the petition in No. 30 to and including January 30, 1964 (R. 480). The petition was filed on January 29, 1964, and both petitions were granted, and the cases consolidated, on March 23, 1964 (R. 481; 376 U.S. 948). The jurisdiction of this Court rests upon 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether Federal Reserve Board approval of the acquisition and operation of a new national bank by a bank holding company, given pursuant to the Bank Holding Company Act of 1956, may later be attacked by competitor banks in a separate suit to enjoin the Comptroller of the Currency from authorizing the opening of the new national bank.

2. Whether the opening and operation of a separately chartered national bank by a bank holding company may be enjoined on the ground that the bank is an unlawful branch of another bank.

3. Whether a State prohibition on the opening of national banks owned by bank holding companies is in conflict with the provisions of the National Bank Act.

STATUTES INVOLVED

The pertinent provisions of the statutes and regulation involved are set forth in Appendix A, *infra*, pp. 79–87.

STATEMENT

1. *The Underlying Facts.* The Whitney National Bank of New Orleans (hereafter "Whitney-New Orleans") is a national bank[1] with its main office and numerous branches in the City of New Orelans, which is coextensive with the Parish of Orleans.[2] It is the largest bank in Louisiana. With the expansion of the New Orleans metropolitan area beyond the city limits, the portion of Jefferson Parish adjoining New Orleans on the east bank of the Mississippi River ("East Jefferson Parish") has had a rapid industrial and residential expansion. Prospects for continued growth are excellent, and the need for further banking service is evident (R. 455; R. 67, 70, 100–107, 426).

Many of the residents of East Jefferson Parish have been customers of Whitney-New Orleans and other banks within the city limits. However, State law (La. R.S. § 6:54) prohibits banks from opening branch offices in parishes other than their home parish and these geographical limitations are made applicable to national banks by the Banking Act of 1933 (12 U.S.C.

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[1] A national bank is a national banking association organized and operated pursuant to the National Bank Act, 12 U.S.C. 21, *et seq.*

[2] A parish in Louisiana is comparable to a county in other States.

36). The downtown New Orleans banks have been unable, therefore, to follow their customers to East Jefferson Parish by establishing branches there.

In 1955, the majority stockholders of the National Bank of Commerce in New Orleans, Whitney-New Orleans' largest competitor, opened a separately chartered affiliate bank in East Jefferson Parish, the National Bank of Commerce in Jefferson Parish. The two banks were controlled by the same stockholders, with an interlocking set of directors and executive officers (R. 42, 65, 116). Another of Whitney-New Orleans' competitors also acquired a separately chartered affiliate there (R. 42, 90, 116).

Faced with this competition and the statutory prohibition against branch offices beyond its home parish, the management of Whitney-New Orleans considered the two possibilities for opening bank facilities in Jefferson Parish: (1) the establishment of an affiliate, similar to those of its competitors; (2) the establishment of a bank-holding company, which would in turn establish a separately chartered bank in Jefferson Parish (R. 65). In order to assure a continuity of of relationship between the new and old bank, and to avoid any conflict of interest in transactions between the banks, the Whitney management, after discussions with a Deputy Comptroller of the Currency, decided to adopt the latter alternative (R. 455–457; 42–43, 69–70, 71–72).

Whitney-New Orleans then developed a program to establish a holding company (Whitney Holding Corporation); to place the ownership of the bank in the

holding company and the ownership of the holding company in the shareholders of the bank; and, finally, to establish a new bank in Jefferson Parish to be owned by the holding company. This involved several steps (R. 461–462; 112–114):

First, Whitney Holding Corporation would be organized as a Louisiana business corporation, and Whitney-New Orleans would pay in $350,000 of its funds (from undivided profits) in return for 5,600 shares of stock, which it would immediately distribute to its shareholders.

Second, a new national bank, the Crescent City National Bank, was to be organized and chartered under the National Bank Act, and Whitney Holding Corporation would pay in $350,000, in return for ownership of its shares.

Third, Crescent City and Whitney-New Orleans would enter into a merger agreement, whereby Whitney-New Orleans was to be merged into Crescent City under the name of Whitney-New Orleans. Whitney Holding would own the merged banks. Any stockholders of Whitney-New Orleans who dissented from the merger would have the statutory right, under 12 U.S.C. (Supp. II) 215a(d), to have their shares appraised by disinterested appraisers and to receive the appraised value in cash (R. 44, 113).

Fourth, the new Whitney-New Orleans would declare a dividend of $650,000 from its undivided profits to its owner, Whitney Holding Corporation.

Fifth, Whitney-National Bank in Jefferson Parish (hereafter "Whitney-Jefferson") would be organized as a national bank under the National Bank Act, with

Whitney Holding paying in $650,000 as it capital, in return for the stock of Whitney-Jefferson. Whitney Holding would then sell qualifying shares to each director.

The net result would be to establish a holding company, owned by the original stockholders of Whitney-New Orleans, which would in turn own both Whitney-New Orleans and Whitney-Jefferson.

The program required the affirmative vote of stockholders representing more than two-thirds of the stock of Whitney-New Orleans (R. 114). After due notice, shareholders representing over 88 percent of the stock of Whitney-New Orleans approved the plan and none of the shareholders exercised their rights to receive the assessed value of their shares in cash (R. 46, 66, 324–328). The program also required (a) the approval of the Comptroller of the Currency (under the National Bank Act) for the chartering of the new bank[3] and (b) the permission of the Board of Governors of the Federal Reserve System (under the Bank Holding Company Act) for the holding company's acquisition and operation of the new bank in Jefferson Parish.

Whitney-New Orleans planned to have one officer, four directors, and no employees in common with Whitney-Jefferson (R. 388). Whitney-Jefferson was to carry its legal reserve with the Federal Reserve Bank of Atlanta and to subscribe to and purchase capital stock of that institution. Although Whitney-

[3] His approval was also required for the chartering of Crescent City, and its consolidation with Whitney-New Orleans.

Jefferson was to establish correspondent banking relations with Whitney-New Orleans, it was to have its own capital structure, loan limits, vault, books of account, and its own stationery, checks, and forms, none of which would mention Whitney-New Orleans (R. 388–389).

2. *Administrative Proceedings.* On June 28, 1961, Whitney submitted its entire program to the Comptroller of the Currency (R. 380–384). In accordance with usual practice, his examiners carried out a full field investigation over a period of several months and communicated with competitor banks to obtain their views (R. 44). By letter of October 3, 1961, Comptroller Gidney gave his preliminary approval to the program, subject to the Federal Reserve Board's approval, under the Bank Holding Company Act, of the acquisition by Whitney Holding Corporation of the stock of Whitney-New Orleans and of the new bank in Jefferson Parish (R. 46–47).

On July 14, 1961, Whitney Holding Corporation filed an application with the Federal Reserve Board for permission to become a registered bank holding company by acquiring substantially all the stock of Whitney-New Orleans and of the new bank, Whitney-Jefferson (R. 58). Pursuant to the Board's regulations (Regulation Y, Sec. 222.4, 12 C.F.R. 222.4, *infra*, p. 86), notice of the application was published in the Federal Register, and interested persons were invited to submit written views and comments (R. 58; 26 Fed. Reg. 6792). Although three potential competitors of Whitney-Jefferson expressed their opposition, none of the respondents did so.

Pursuant to Section 3(b) of the Bank Holding Company Act (12 U.S.C. 1842(b), *infra*, pp. 81–82), the Board requested the Comptroller's advice as to whether it should approve the Whitney application. The Comptroller recommended approval by letter of October 11, 1961 (R. 44, 166–167). Thereafter, the Federal Reserve Board ordered that a public proceeding be held on January 17, 1962, "to afford further opportunity for the expression of views by interested persons" (R. 58; 26 Fed. Reg. 12312). Notice of the application and hearing was widely publicized in the New Orleans press.[4]

At the hearing before the seven Governors of the Board, testimony and argument were submitted on behalf of the application by Whitney's president and attorney. Testimony and argument in opposition were also submitted by dissident stockholders and potential competitors, but none of the present respondents appeared at the hearing or made their objections known to the Board within the fifteen additional days available for submission of written views or at any time prior to its decision (R. 61–95). On May 3, 1962, the Board approved the Whitney application by a vote of 6 to 1 (R. 97–98, 99–111), but provided that the acquisitions should not be consummated sooner than seven days after that date. No petition for rehearing or reconsideration was filed within that time.

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[4] New Orleans States-Item, December 20, 1961, p. 7; New Orleans Times-Picayune, December 20, 1961, p. 24; New Orleans States-Item January 17, 1962, p. 17; New Orleans Times-Picayune, January 18, 1962, p. 21.

On June 13, 1962, four days after they commenced this action against the Comptroller in the United States District Court for the District of Columbia, two of the present respondent banks (Bank of New Orleans and Trust Company, and Guaranty Bank and Trust Company) filed with the Federal Reserve Board a petition for reconsideration of its decision approving the Whitney application, raising for the first time the claim that the Whitney proposal violated the branch banking laws (R. 167–169). By letter dated June 21, 1962, a third respondent, the State Bank Commissioner, also requested a "new hearing" (R. 165). On June 25, 1962, the Board denied the petition on the grounds that it was untimely and "without substantial merit" (R. 168).

3. *Judicial Proceedings Against the Federal Reserve Board in the Fifth Circuit.* On June 30, 1962, two of the respondent banks petitioned the United States Court of Appeals for the Fifth Circuit for judicial review of the Board's decision under Section 9 of the Bank Holding Company Act (12 U.S.C. 1848, *infra*, p. 84), contending that Whitney-Jefferson would be merely a branch of Whitney-New Orleans, The Louisiana State Bank Commissioner, the third respondent, did not file a timely petition for review but later sought to intervene on their behalf. Although the case has been briefed and argued orally, the Fifth Circuit has withheld decision.[5]

[5] By order of October 7, 1963, the Fifth Circuit stated that decision would be withheld until final disposition of the "proceedings involving application for a writ of certiorari" in the case at bar.

4. *Judicial Proceedings Against the Comptroller (The Instant Cases).* By May 25, 1962, Whitney-Jefferson was organized as a national bank under the terms of the National Bank Act, and had been recognized as such by the Comptroller (R. 388, 392–394). Its directors and officers had been elected and its employees selected according to its program; its stock was paid in; and it had subscribed to and paid for capital stock of the Federal Reserve Bank of Atlanta (R. 46, 115, 388–389). All that remained to be done to consummate the Whitney program was for the Comptroller to issue a certificate of authority, under the National Bank Act (12 U.S.C. 27, *infra*, pp. 78–79), to permit Whitney-Jefferson to commence the business of banking (R. 46, 115–116).

On June 9, 1962, three State-chartered banks (including respondents Bank of New Orleans and Guaranty Bank and Trust Company), claiming a threat of competitive injury, brought this action in the District of Columbia to restrain the Comptroller from issuing the certificate of authority which would permit Whitney-Jefferson to open for business (R. 16–19).[6]

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[6] The three respondent banks are State-chartered competitors or potential competitors of the Whitney banks which do not have offices in Jefferson Parish. Two have their offices in New Orleans and one in distant Lafayette Parish. One of the three original plaintiffs, which was located in Jefferson Parish, voluntarily withdrew as a party plaintiff. Respondent Bank of Louisiana in New Orleans and the respondent State Bank Commissioner later intervened as parties plaintiff and Whitney-Jefferson intervened as a party defendant (R. 458, n. 6).

The gravamen of the complaint was that Whitney-Jefferson was a branch bank within the meaning of the Banking Act of 1933 (12 U.S.C. 36, *infra*, pp. 79–80), and that its establishment was therefore prohibited by law (R. 6–20). An additional contention, advanced later, was based on the fact that, while the complaint was pending in the district court, the Louisiana legislature enacted Louisiana Act No. 275 of 1962, which purported to render it unlawful for any bank owned or controlled by a bank holding company to open for business whether or not it had received its charter or certificate to engage in the banking business (*infra*, p. 85). The bill was signed by the Governor on July 10, 1962, as "emergency legislation," to become effective immediately (R. 460).

The case was submitted to the district court on cross-motions for summary judgment which relied upon the administrative record and opinions of the Federal Reserve Board, affidavits, and other documents. All parties agreed that there was no genuine dispute of fact; none of them considered the intent of the Whitney management in regard to the operation of Whitney-Jefferson to be material[1] (R. 223–224, 275–293, 307–309, 318–323, 343, 360–366).

[1] The president of Whitney-Jefferson asserted, by affidavit, that Whitney-Jefferson had been recognized as "a newly organized independent bank," and that it would "operate a banking house entirely separate from that of the Whitney-New Orleans" (R. 388). Respondents took issue with these assertions (R. 420–421), but apparently none of the parties regarded the matter as a genuine issue of material fact (R. 431–434).

In a short memorandum opinion (R. 435–438) the district court assumed without discussion that the respondents, as competitor banks, had standing to invoke its jurisdiction. On the merits, the court held that the Bank Holding Company Act of 1956 reserved to, or conferred upon, the States authority to prohibit the operation within their borders of banks owned by holding companies, including national banks; and that Louisiana Act No. 275 of 1962 deprived the Comptroller of the Currency of his authority under the National Bank Act to issue a certificate of authority to the Whitney National Bank in Jefferson Parish (R. 437–438). Accordingly, the court granted the respondents' motion for summary judgment and entered a permanent injunction restraining the Comptroller of the Currency from issuing a Certificate of Authority authorizing the opening of Whitney-Jefferson "in violation of Louisiana Act 275 of 1962" (R. 451).

Both the Comptroller and Whitney-Jefferson appealed. In addition to his arguments on the merits, the Comptroller again urged that the district court lacked jurisdiction because competitor banks do not have standing to challenge the opening of a new national bank and because such banks have an adequate administrative remedy before the Federal Reserve Board with a right to judicial review of the Board's decision.[8] Both appellants called the court's

[8] Contrary to the suggestion in the opinion below (R. 465), on oral argument counsel for the Comptroller stated to the court that the standing argument was not being waived, but that his position on that issue was set forth fully in the brief, and that he would devote his time on oral argument to the merits.

attention to the review proceedings which were then pending in the Fifth Circuit, and the Comptroller urged that respondents had not exhausted their remedies under the Bank Holding Company Act.

The court of appeals held that the district court had jurisdiction. It ruled that bank charters are the equivalent of semi-exclusive franchises and confer upon their holders a right to be free from the competition of a branch whose operation violates the branch-banking provisions of the Banking Act of 1933, 12 U.S.C. 36 (R. 465–470). On the merits, the court inferred that "Whitney-New Orleans intends to do business through Whitney-Jefferson in the same way as if the institutions were one" (R. 475), and concluded that Whitney-Jefferson was a branch of Whitney-New Orleans, the operation of which, outside Orleans Parish, was prohibited by the Banking Act of 1933, 12 U.S.C. 36 (R. 470–477). The court found it unnecessary to rule upon the applicability of Louisiana Act 275 of 1962 to national banks.

The Comptroller and Whitney-Jefferson filed timely petitions for rehearing *en banc*. The Comptroller again urged that the district court lacked jurisdiction over the controversy. Apart from the matter of standing, he argued that the decision of the court of appeals was based upon a ground which could and should have been presented to the Federal Reserve Board, and that the consequence of its ruling was to sanction an impermissible collateral attack upon the Board's decision. The petitions for rehearing were denied without opinion on October 17, 1963 (R. 479–480).

SUMMARY OF ARGUMENT

I

The Bank Holding Company Act of 1956 prohibits a bank holding company from acquiring ownership or control of a new or existing national bank without the approval of the Federal Reserve Board. The Act and regulations provide for a full administrative hearing at which competitor banks may present their objections. No other approval is necessary for a holding company to acquire an existing national bank. Since every newly chartered national bank (whether or not owned by a bank holding company) must have the Comptroller's permission to open, a bank holding company must obtain the Comptroller's consent to open a newly chartered national bank even after it has the Federal Reserve Board's consent to acquire the new subsidiary. The Comptroller's decision is made *ex parte* after an informal investigation. The jurisdictional question presented here is whether competitor banks may disregard the established administrative proceedings before the Board and attack the acquisition of a newly chartered national bank by a district court action to enjoin the Comptroller from allowing the bank to open. We submit that Congress plainly intended the Federal Reserve Board (subject, of course, to review in the appropriate Court of Appeals) to be the exclusive tribunal for determing the validity of any objections to the operation of a national bank which are grounded upon its ownership by a bank holding company.

The language and history of the Bank Holding Company Act of 1956 are determinative. Congress re-

jected a House bill that would have authorized the Comptroller to veto a proposed holding company acquisition of a national bank. Its careful decision to make the Board's, and not the Comptroller's, decision final would be overturned if the Comptroller could deny a new national bank permission to open on the very grounds committed to the Board, *i.e.*, its ownership by a bank holding company. Congress also deliberately rejected a scheme of *de novo* district court review of Board decisions which is almost identical to that authorized by the courts below.

Even without this specific legislative history, the fact that Congress established a full and formal administrative proceeding before a tribunal expert in banking would, under established doctrine, require recourse to the Board and the exhaustion of administrative remedies, and would foreclose a collateral attack on the Board's jurisdiction in the federal district courts. Nor could the Board's decision be attacked in any court other than the one the Act makes the exclusive forum for judicial review. *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320. The alternative—an unnecessary and unseemly duplication of actions raising the same issues before different federal agencies to be reviewed on different records by different courts—was never intended by Congress.

Finally, even prior to the enactment of the Bank Holding Company Act in 1956, competitor banks lacked standing to bring a suit to enjoin the Comptroller from permitting a new national bank to open its doors. *A fortiori*, competitors lack such standing

after Congress has provided them with an alternative forum where an acquisition is reviewed with a full administrative hearing.

II

Although the operation of separately chartered banks owned or controlled by a bank holding company, like the operation of one bank with several branches, permits the use of multiple banking offices with common ownership and control, there are substantial differences between bank holding company operations and branch banking. To take but a few examples, the National Bank Act requires each separately chartered bank to have its own capital structure, and lending and borrowing limitations; and capital funds of one bank owned by a holding company may not be transferred directly or indirectly to another bank. In contrast the branches of a single bank share one capital structure, so that the assets of the bank may be freely transferred among its branches, and the lending and borrowing limitations of each branch are the same as the total for the entire bank. Numerous other requirements are imposed upon separately chartered national banks but are wholly absent in branch banking.

In the Banking Act of 1933 Congress made branch banking by national banks subject to the restrictions as to location of branches imposed by State law upon State chartered banks. Sec. 23, 12 U.S.C. 36(c). It deliberately adopted a wholly different method of regulation with regard to separately chartered subsidiaries of bank holding companies, however, because

of its conviction that the two kinds of banking were "entirely different" 76 Cong. Rec. 1998.

Again, in its consideration of the Bank Holding Company Act of 1956, Congress rejected a proposal which have made State law restrictions as to the location of branches applicable to separately chartered banks owned by bank holding companies. It instead chose to impose a wholly distinct set of requirements on bank holding company operations, making no reference to the branch banking limitations of State law because of its view that the two kinds of banking were "vastly different." Sen. Rept. 1095, Part I, 84th Cong., 1st Sess., pp. 10–11; 102 Cong. Rec. 6753–6754.

Congress thus deliberately adopted one set of regulations for branch banking and a wholly different scheme for bank holding company operations, although it was fully aware that the latter allowed bankers to obtain some of the advantages of the former. Congress has chosen to define the rights and obligations of the two different kinds of banking, and to leave private parties free to choose among the alternatives. Even apart from the want of jurisdiction, therefore, the court below erred in subjecting a separately chartered bank to the restrictions imposed on branch offices of a single bank.

III

Louisiana Act 275 of 1962, which prohibits the opening of banks owned by bank holding companies, provides no basis for affirming the decision below. In

the first place, while State law can properly be considered by the Federal Reserve Board, it is plainly irrelevant to the performance of the functions of the Comptroller. His function under the National Bank Act is simply to guarantee and certify the applicant's compliance with the applicable provisions of federal banking law. He is neither authorized to determine, nor required to certify, that a proposed national bank has complied with all of the provisions of State law. 12 U.S.C. 26, 27.

More basically, a State statute prohibiting the opening of a national bank is in conflict with the National Bank Act. The Act constitutes a complete system for the creation of national banks which are to operate as instrumentalities of the federal government to perform vital federal functions. A State may not, by prohibiting the opening of national banks, deny the power and right of Congress to utilize this method of realizing its ends. State laws which merely impair or interfere with the use of national banks to perform their federal purposes are in conflict with that Act and invalid. *Mercantile National Bank at Dallas* v. *Langdeau,* 371 U.S. 555, 558–559; *Franklin National Bank* v. *New York,* 347 U.S. 373. A State is wholly without power to prevent a national bank from commencing the business of banking.

Respondents contend that, even if Louisiana Act 275 would otherwise be unconstitutional, it is saved by Section 7 of the Bank Holding Company Act of 1956. But this section did not confer upon the States any new authority to regulate or control national

banks; it merely preserved their preexisting authority over State chartered banks and bank holding companies. 12 U.S.C. 1846; Sen. Rept. 1095, Part II, 84th Cong., 2d Sess., p. 5. The States, never having had the authority to prevent the opening of national banks, were not granted it by the 1956 Act.

ARGUMENT

I

THE DISTRICT COURT WAS WITHOUT JURISDICTION TO CONSIDER OBJECTIONS OF COMPETITOR BANKS TO THE OPERATION OF A NATIONAL BANK BY A BANK HOLDING COMPANY

The Bank Holding Company Act of 1956 prohibits a bank holding company from acquiring ownership or control of a new or existing bank without the approval of the Federal Reserve Board. Sec. 3(a), 12 U.S.C. 1842(a), *infra*, p. 81. The Act contemplates a full administrative proceeding in which all interested persons may participate and the views of the interested supervisory authority (the Comptroller of the Currency or the corresponding State banking authority) will be obtained. Sec. 3(b), 12 U.S.C. 1842(b), *infra*, pp. 81–82. The Board's determination is subject only to judicial review by the appropriate court of appeals, which must accept the administrative findings if they are supported by substantial evidence. Sec. 9, 12 U.S.C. 1848, *infra*, p. 84.

The permission of the Comptroller of the Currency under the National Bank Act is necessary in order to open a new national bank. 12 U.S.C. 27, *infra*, pp. 78–

79. Consequently, when a bank holding company intends to acquire a subsidiary which is to be opened as a new national bank, there are two steps, one requiring the approval of the Federal Reserve Board (for the acquisition) and the other that of the Comptroller of the Currency (for the opening). The National Bank Act, however, makes no provision for an administrative hearing or for judicial review, and the Comptroller's decisions are made informally, without an administrative record.

The prinicpal jurisdictional issue presented by this case, therefore, is whether competitor banks must raise, in the established administrative proceedings before the Federal Reserve Board, all objections to the proposed acquisition and operation of a new national bank which are based upon the proposed ownership of the bank by a bank holding company. Respondents contend, and the court below has held, that they may assert such objections—after the Comptroller has recommended to the Board approval of the acquisition and after the Board has authorized it—by a district court action to enjoin the Comptroller from authorizing the opening of the national bank. In our view, any challenge to the acquisition and operation of the new subsidiary which is based upon its ownership by a bank holding company must be presented to the Federal Reserve Board. We submit, moreover, that the Board's decision on these matters is conclusive, subject only to the judicial review in the court of appeals specified by the Bank Holding Company Act.

Only the clearest of statutes or legislative history would warrant the conclusion that Congress intended the propriety of the ownership of a national bank subsidiary by a bank holding company to be the subject of duplicate litigation before several different federal tribunals with different procedures, different standards of review, and different records before them. The resulting waste of the time and energies of the federal courts and administrative agencies, as well as of the parties, would, without more, make such a Congressional purpose unlikely. The possibility of unseemly conflicts—some of them irreconcilable and others amenable to resolution only by this Court—adds to the manifest undesirability of multiple litigation of the same federal issues. That is the inescapable result, however, of allowing the substantive issues to be litigated in a district court, as they were in this case, instead of confining them within the exclusive jurisdiction of the Federal Reserve Board.

Even if the statutory scheme were ambiguous, one would not assume without some compelling reason that Congress intended to authorize multiple litigation which would be, at once, so wasteful of judicial effort and so disruptive of orderly process. Consideration of the applicable federal statutes confirms the conclusion that Congress had no such purpose and that it intended the Federal Reserve Board to be the exclusive forum for litigation of challenges based upon the ownership or operation of a bank subsidiary by a bank holding company.

A. THE OBJECTIONS RAISED BY THE RESPONDENTS TO THE OPENING OF WHITNEY-JEFFERSON ARE BASED UPON ITS OWNERSHIP BY A BANK HOLDING COMPANY AND COULD THEREFORE HAVE BEEN ASSERTED AS GROUNDS FOR DENIAL OF THE FEDERAL RESERVE BOARD'S CONSENT TO THE ACQUISITION OF WHITNEY-JEFFERSON BY WHITNEY HOLDING CORPORATION

The Bank Holding Company Act of 1956 was designed to centralize the regulation and control of bank holding companies in a single federal agency. Sen. Rept. 1095, Part I, 84th Cong., 1st Sess., pp. 8–9, 14; 102 Cong. Rec. 6760. To this end, Congress established the Board as an administrative tribunal where all interested persons and agencies, including competitor banks, could express their views and present any objections to the effects of the combination of banking resources and operations which would result from the proposed acquisition and operation.

1. The Act and the regulations adopted pursuant thereto provide for notice to the appropriate federal or State bank supervisory authority (the Comptroller of the Currency for national banks or State bank commissioners for State-chartered banks), and to the public, with at least a thirty-day period for the filing of views. Sec. 3(b), 12 U.S.C. 1842(b), and 12 C.F.R. 222.4, *infra*, pp. 81–82, 86. The Act requires a full formal hearing in instances where the supervisory authority disapproves the application; directs the Board to "afford all interested parties a reasonable opportunity to testify at such hearing;"[9] and specifies that the

[9] The regulations provide that a party to a proceeding shall be "any person or agency named or admitted as a party or any person who has filed a request in writing to be admitted as a

Board should "grant or deny the application on the basis of the record made at such hearing." Sec. 3(b), 12 U.S.C. 1842(b), *infra*, pp. 81–82. Similarly, where the supervisory authority does not object, the regulations contemplate that the Board may order a hearing, with decision on the record, either upon its own motion or "upon the request of any party in interest." 12 C.F.R. 222.7, *infra*, pp. 86–87. Thus, while the Act does not require a hearing on every application, the Act and regulations make adequate provision for a hearing where the application and the facts on which it is based are disputed,[10] and for the expression of views and participation in the administrative proceedings by all interested parties, including competitor banks and the appropriate bank supervisory authority. As the chief sponsor and manager of the bill explained (102 Cong. Rec. 6752):

> This procedure should afford an opportunity for developing the true merits of each case and also assures adequate recourse to court review for the aggrieved party.

The Bank Holding Act authorizes judicial review of the Board's determination, on petition by "[a]ny party aggrieved," in the court of appeals for the cir-

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party and who is entitled as of right to be admitted." 12 C.F.R. 222.7(c), *infra*, p. 87. The Board regularly admits competitor banks as full parties to the administrative proceedings. See, *e.g.*, *Trans-Nebraska Co.* (F.R.B. Docket No. BHC-66).

[10] The Board has denied applications without a hearing where the applicant holding company has had adequate opportunity to present its evidence and the underlying facts were undisputed. *E.g.*, *First Wisconsin Bankshares Corp.* v. *Board of Governors*, 325 F. 2d 946, 960 (C.A. 7).

cuit wherein that party has its principal place of business, or the Court of Appeals for the District of Columbia Circuit. Such review proceeding must be instituted within sixty days, and the Board's findings of fact are conclusive if supported by substantial evidence. Sec. 9, 12 U.S.C. 1848, *infra*, p. 84.

2. If the opening and operation of Whitney-Jefferson as a national bank were forbidden by the National Bank Act, the Banking Act of 1933, or a valid State law because of its ownership by, or relation to, Whitney Holding Company, the Federal Reserve Board could not properly authorize the acquisition in this case. The Board is charged with a broad responsibility to authorize only such acquisitions as are in the public interest; its approval provides a Federal license to engage in bank holding company operations. In particular, the Bank Holding Company Act of 1956 directs the Board to consider both "the convenience, needs, and welfare of the communities and the area concerned" and "whether or not the effect of such acquisition * * * would be to expand the size or extent of the bank holding company system involved beyond limits consistent with * * * the public interest * * *." 12 U.S.C. 1842(c)(4) and (5). There can be little doubt that this statutory mandate includes a directive to consider, and accept or reject on their merits, all objections to the ownership or control of a national bank by a bank holding company, including those set forth by the respondents in this case. They contend, *first*, and the court below held, that the relationship of Whitney-Jefferson to

the Whitney Holding Corporation and Whitney-New Orleans so closely approximates the relationship of a branch office to the central office of a single bank that the operation of Whitney-Jefferson as a national bank subsidiary in Jefferson parish is prohibited by the restrictions in the federal Banking Act of 1933 relating to the location of branch offices. We believe that the branch banking restrictions are wholly inapplicable to separately chartered subsidiaries of a bank holding company (see *infra*, pp. 40–64), but respondent's contention, if sound, would require the Board to deny Whitney Holding Corporation's application to acquire Whitney-Jefferson. An application to establish a relationship forbidden both by another federal statute and by the State law it incorporates is not consistent with the "welfare of the communities and the area concerned" and would result in expanding the "extent of the bank holding company system involved beyond limits consistent with * * * the public interest." 12 U.S.C. 1842(c)(4) and (5).

Respondents contend, *second*, and the district court held, that the operation of Whitney-Jefferson is prohibited by a valid and applicable State law forbidding the acquisition or opening of holding company subsidiaries. This contention, if sound, would also require the Board to deny its consent to the acquisition under 12 U.S.C. 1842(c)(4) and (5). The Board could not properly authorize the acquisition of a national bank subsidiary if either the acquisition or the subsequent operation of the subsidiary were forbidden by such a valid State law prohibiting holding

company operations. For the State law would then define the public interest which the Board is directed to protect.

Thus, both issues were cognizable by the Federal Reserve Board and the courts on direct review.

B. THE BANK HOLDING COMPANY ACT OF 1956 AND ITS LEGISLATIVE HISTORY ESTABLISH THAT A DECISION OF THE FEDERAL RESERVE BOARD AUTHORIZING AN ACQUISITION WAS NOT TO BE SUBJECT TO LATER REVIEW BY THE COMPTROLLER OR BY A FEDERAL DISTRICT COURT IN A SUIT AGAINST THE COMPTROLLER

The conclusion is irresistible that Congress intended the statutory proceedings before the Federal Reserve Board—and not district court actions against the Comptroller of the Currency—to be the means by which competitor banks could assert objections to the ownership or operation of a subsidiary by a bank holding company. Indeed, in most cases the Board is the only possible forum. The most frequent method by which a bank holding company expands is to acquire a controlling interest in, or all the stock of, an existing national or State chartered bank which is already operating under independent management and ownership.[11] Since the bank needs no additional certificate or authority from the Comptroller of the Currency (or his State counterpart) to continue its operations under the management and control of the bank holding company, there is no possibility of a suit to enjoin the Comptroller of the Currency (or his State counterpart) from permitting the bank to engage in the business of banking.

[11] Fischer, *Bank Holding Companies* (1961), p. 111. See, H. Rept. 609, 84th Cong., 1st Sess., p. 14.

There is, of course, no reason why Congress would have wished a different result in the less frequent case where a holding company establishes and acquires a newly formed bank subsidiary. In this situation the consequences of the acquisition are less, not more, substantial, for an existing bank is not withdrawn from independent operation and competition, and its assets are not added to the resources of the holding company. The terms and legislative history of the Bank Holding Company Act establish what common sense suggests: that Congress no more intended multiple litigation of the same issues before two federal agencies when a newly formed subsidiary is established than when an existing bank is acquired.

1. The Bank Holding Company Act provides specifically that the Federal Reserve Board's determination as to the propriety of a holding company's acquisition of a subsidiary shall be binding upon the Comptroller, subject only to the statute's provisions for judicial review of the Board's decision. Section 3(b) of the Act requires the Board to give the Comptroller notice of any proposed acquisition of the shares or assets of a national bank. 12 U.S.C. 1842(b). If the Comptroller disapproves the application, the Board must hold a hearing at the conclusion of which it is authorized to "grant or deny the application" as it sees fit. *Ibid.* An earlier House bill had sought, over objections by the Board, to give the Comptroller (or State bank supervisory authority) the right to deny bank holding company applications, and to make that denial "final." Sec. 5(b), H.R. 6227, 102 Cong. Rec. 8186–8187. H. Rept. 609, 84th Cong., 1st Sess., pp.

14–15. The Senate, however, rejected that approach Although it provided for the expression of views by the Comptroller (or State bank supervisory authority), it gave the Federal Reserve Board the authority to approve such applications, despite the disapproval of the supervisory authority. Sen. Rept. 1095, Part I, 84th Cong., 1st Sess., pp. 8–10; 102 Cong. Rec. 6760. The Senate version became the Bank Holding Company Act. 102 Cong. Rec. 6964, 7161.

Congress thus deliberately rejected a proposal that the Comptroller be empowered to deny bank holding companies permission to acquire national banks. This rejection necessarily carried with it rejection of any claim of power in the Comptroller to deny effect to the Board's decision by refusing to certify a new bank because of its ownership by a bank holding company, *i.e.*, to veto the Board's decision on grounds that were or could have been presented to the Board.

2. If the Comptroller is bound by the decision of the Federal Reserve Board, subject only to judicial review of that decision, he cannot be enjoined to disregard the Board's decision. Indeed, the legislative history of the Bank Holding Company Act establishes that Congress also specifically rejected a proposal for such *de novo* district court review of the Board's decision as is involved in a suit to enjoin the Comptroller from certifying a new national bank on grounds of its ownership by a bank holding company.

The same House bill which would have given the Comptroller the power to overrule the Board's deci-

sion provided that the Board's decision should be subject to judicial review at any time in a district court, with the facts subject to a trial *de novo*. Congress decided otherwise. It made the Board decisions subject to review only in the appropriate court of appeals, directed that the Board's findings must stand unless unsupported by substantial evidence, and required that the review proceeding be instituted by any "party" aggrieved, within sixty days. Compare Sec. 9, 12 U.S.C. 1848 (*infra*, p. 84), and Sen. Rept. 1095, Part I, 84th Cong., 1st Sess., p. 9, and Part II, 84th Cong., 2d Sess., p. 5; with Sec. 9 of H.R. 6227, 101 Cong. Rec. 8187, and H. Rept. 609, 84th Cong., 1st Sess., pp. 22, 25–26.

C. ESTABLISHED PRINCIPLES REQUIRING EXHAUSTION OF ADMINISTRATIVE REMEDIES AND THE USE OF STATUTORY REVIEW PROCEDURES CONFIRM THE VIEW THAT THE PROCEEDINGS AUTHORIZED BY THE BANK HOLDING COMPANY ACT ARE EXCLUSIVE

Congress has charged the Federal Reserve Board with the responsibility for authorizing or forbidding, as the public interest requires, acquisitions by bank holding companies. The detailed procedures it has provided to assure a full and fair administrative hearing before an expert agency and judicial review refute any suggestion that private parties were left free to ignore the proceedings before the Board and to proceed by way of suit in a Federal district court for an injunction against the opening of a national bank on the ground of its ownership by a bank holding company.

1. Congress plainly decided to rest the initial determination as to the propriety of a holding company acquisition in an agency expert in the operations of

the banking system rather than in a Federal district court. The doctrines of primary jurisdiction and exhaustion of administrative remedies have regularly been invoked by this Court to protect such a Congressional determination against collateral attacks in the federal courts.[12] The principle involved in a long line of cases was stated succinctly in *Far East Conference v. United States*, 342 U.S. 570, 574–575:

> * * * in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.[13]

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[12] See, *e.g.*, *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426; *United States v. Corrick*, 298 U.S. 435; *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48–51; *Aircraft & Diesel Corp. v. Hirsch*, 331 U.S. 752, 767; *Lichter v. United States*, 334 U.S. 742; *Callanan Road Improvement Co. v. United States*, 345 U.S. 507, 512.

[13] The dissent in *Far East Conference* did not reject this principle, but regarded it as inapplicable because the shipper had not invoked the jurisdiction of the Shipping Board by filing the challenged rate schedule. The dissent agreed that "If the rates were filed, of course the Board would have exclu-

The principle is fully applicable to the present case. The court below held that the relationship of Whitney-Jefferson to Whitney Holding Corporation would not be that typically associated with bank subsidiaries and holding companies but would rather approximate the relation of a branch office to a central office of a single bank. Therefore, the court held, the branch-banking restrictions of the Banking Act of 1933 were applicable. But Congress plainly relied on the training and experience of the Federal Reserve Board, not a federal court, to assess the relationship to be established between a proposed subsidiary and a bank holding company. If there were any room for treating a separately chartered subsidiary as a mere branch office—and we submit this is never proper (*infra*, pp. 40–64)—the determination of this issue would have to be made in the first instance by the Federal Reserve Board, the agency vested by Congress with administrative discretion because of its expertness in the banking field.

Respondents had due notice of the proceedings before the Federal Reserve Board and ample opportunity to express their views (R. 168). To the extent that they did not do so, and failed to become parties to those proceedings,[11] they are precluded from

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sive jurisdiction to pass on them." 342 U.S. at 578. Here, Whitney invoked the jurisdiction of the Federal Reserve Board long before any district court action was initiated.

[11] The respondent Bank of Louisiana in New Orleans did not in any way make its views known to the Board and did not seek review of the Board's decision. The other respondents made their positions known to the Board only after the Board's decision, and are now seeking judicial review of that decision in the Court of Appeals for the Fifth Circuit. See pp. 7-9, *supra*.

raising their objections by their failure to avail themselves of the remedies specified by the Bank Holding Company Act. For a party may not circumvent a Congressional decision to vest exclusive regulatory authority in an administrative agency by refusing to participate in the specified administrative proceedings, and then attacking the administrative determination in a collateral action. *Myers* v. *Bethlehem Shipbuilding Corp., supra,* 303 U.S. 41, 50–51; *Callanan Road Improvement Co.* v. *United States,* 345 U.S. 507, 512; *Federal Power Commission* v. *Colorado Interstate Gas Co.,* 348 U.S. 492, 501–502.[15]

2. Competitor banks must thus first present to the Federal Reserve Board their objections to the acquisition of a national bank. It is equally clear that the only forum in which they can thereafter attack the Board's decision is the court of appeals authorized by statute to review that decision. This Court's decision in *City of Tacoma* v. *Taxpayers of Tacoma,* 357 U.S. 320, recently confirmed in *Seattle* v. *Beezer,* 376 U.S. 224, is directly in point. Accord, *United States* v. *Corrick,* 298 U.S. 435.

In the *City of Tacoma* case, the city had applied to the Federal Power Commission for a license to build a power project, including two dams, on a tributary of the Columbia River. The State of Washington appeared in the proceedings before the Com-

[15] The pendency of the Fifth Circuit proceedings does not enhance respondent's position, because the doctrine of exhaustion of remedies requires not merely the institution of the remedies specified by Congress, but the pursuit of such remedies to their conclusion. *Aircraft & Diesel Corp.* v. *Hirsch,* 331 U.S. 752, 767.

mission urging, *inter alia*, that Tacoma, a creature of the State, did not have the capacity under the laws of that State to act under the proposed license. The Commission rejected that contention, and the State petitioned for review to the Ninth Circuit Court of Appeals. While the review proceeding was pending there, suit was filed by taxpayers of Tacoma in a State court attacking the validity of the bonds which Tacoma sought to issue to finance the construction of the project. The plaintiffs alleged that the bonds were invalid because State law did not authorize the City to carry out the project. While the State court action was pending, the Ninth Circuit sustained the F.P.C.'s grant of a license to Tacoma, and its decision became final upon the denial of certiorari. The State courts nevertheless held that the bonds were invalid because the City did not have the capacity under the laws of the State to condemn a State fish hatchery, as would be necessary for the City to construct the proposed dams under the license. 357 U.S. at 332–333.

This Court reversed, holding unanimously that the attacks on the project raised by the taxpayers in the bond validation suit constituted impermissible collateral attacks upon the Commission's decision. The Court held that the method of review specified in the Federal Power Act was exclusive and "necessarily precluded *de novo* litigation between the parties of all issues inhering in the controversy, and all other modes of judicial review." 357 U.S. at 336. The Court noted that the specific issue upon which the State courts relied to invalidate the bonds, and thwart

the project, had been raised and determined in the litigation culminating in the approval of the Federal Power Commission's grant of a license, but ruled that "even if it might be thought that this issue was not raised in the Court of Appeals, it cannot be doubted that it could and should have been." 357 U.S. at 339. The Court then held that the decision was binding not only upon the State, which had appeared before the Commission and in the specified review proceeding, but also upon its citizens, whom it represented. 357 U.S. at 340–341.

In the case at bar, as in *City of Tacoma* v. *Taxpayers of Tacoma*, those who attack the proposed action purport to attack the execution of the proposal, instead of directly attacking the license. Again, as in that case, the attack is based upon an issue which was or should have been raised before the agency and in the direct review proceedings (pending before the Fifth Circuit) specified by the applicable statute.[16] While the Federal Power Act, unlike the Bank Holding Company Act, provides expressly that the statutory mode of review is exclusive, the legislative history of the Bank Holding

[16] Here, no less than in the *City of Tacoma* case and *Seattle* v. *Beezer*, *supra*, the parties were represented before the federal agency, although they did not appear personally. In *City of Tacoma* the Court held that the State had represented the taxpayer-plaintiffs; in *Seattle*, it was the city-licensee. Here the respondents were asserting rights under the branch banking provisions of the Banking Act of 1933—a statute administered by the Comptroller of the Currency. The Comptroller is made a necessary participant to Board proceedings involving national banks and he represents, in these proceedings, any interests arguably protected by statutes he administers. At any rate, respondents had notice and ample opportunity to express their views to the Board. See *supra*, pp. 31–32.

Company Act establishes no less conclusively that Congress deliberately rejected any scheme of *de novo* review in the district courts (*supra*, pp. 28–29). Thus, here, as in the *City of Tacoma* case, the collateral attack upon the agency's decision is impermissible.

Insofar as respondents have presented their contentions to the Federal Reserve Board, they are bound by the decision of the agency, unless and until that decision is overturned in the judicial review proceedings specified by the Act. Insofar as respondents did not avail themselves of the administrative and judicial remedies prescribed by that Act, they are precluded from obtaining judicial relief in this collateral proceeding by their failure to exhaust those remedies. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48–51; *Callanan Road Improvement Co.* v. *United States*, 345 U.S. 507, 512; *United States* v. *Corrick*, 298 U.S. 435.

3. The doctrines requiring exhaustion of administrative remedies and limiting judicial review to the statutory method are designed to effectuate the intent of Congress in enacting a complete and detailed regulatory scheme such as that found in the Bank Holding Company Act of 1956. Respect for these doctrines is no less necessary in order to avoid the consquences of duplicative and conflicting litigation.

If the legality of a holding company's ownership or operation of a subsidiary could be challenged by a suit to enjoin the Comptroller from authorizing the opening of the subsidiary for business, multiple and piecemeal litigation would result. Often (as in this case) some competitors would challenge the holding

company's plan before the Federal Reserve Board, while others would reserve their contentions for presentation to a district court in the event the Board's decision was unfavorable. Alternatively, litigation of the same issues in the two tribunals might take place concurrently. In either event, duplicative litigation would impose wholly unnecessary burdens of expense and delay upon the governmental and private parties, the Federal Reserve Board, and the courts.

Litigation of the propriety of a holding company acquisition before both a district court and the Board would, moreover, result in conflicting determinations as unseemly as they are unnecessary. The facts found on a record made before a district court might differ from those found by the Federal Reserve Board on a different record. The conflict would be confounded if, as might well be the case, both sets of findings were supported by substantial evidence. Similarly, conflicts as to the application of federal law to the same transaction would develop where two different courts of appeals were called upon to review the same transaction—one on review of the Board's decision; the other on review of the district court's decision. Far from endorsing such a result, the scheme adopted by Congress carefully avoids it.

D. COMPETITORS LACK STANDING TO CHALLENGE THE COMPTROLLER'S APPROVAL OF THE OPENING OF A NEW NATIONAL BANK

We have shown that the Bank Holding Company Act of 1956 makes the Federal Reserve Board the exclusive tribunal for litigation of challenges to the acquisition or operation of a national bank based on

its ownership by a bank holding company. It is noteworthy, in addition, that even before the enactment of the 1956 statute, competitors lacked standing to present such challenges in a suit to enjoin the Comptroller of the Currency from authorizing the opening of a new national bank under the National Bank Act. Prior to this case no district court had entertained a suit by a competitor bank to enjoin the issuance by the Comptroller of a certificate to commence business as a new national bank under the National Bank Act.[17] We believe the district court was demonstrably wrong in entertaining this action.

The claims of three respondents are grounded upon loss of business and profits which might result if the new national bank begins to engage in the business of banking in Jefferson Parish (R. 6, 16–19, 170–172).[18] The Comptroller has not undertaken to regulate them; they have not been ordered to forego any of their activities; and they have not been subjected to any obligation or duty. The Comptroller's action does not deprive them of any property, contract, or statutory right.

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[17] One other court of appeals has—we believe erroneously—entertained suits by competitors challenging the certification of a new branch office under the Banking Act of 1933. See, *e.g.*, *Gidney* v. *Wayne Oakland Bank*, 252 F. 2d 537 (C.A. 6), certiorari denied, 358 U.S. 830.

[18] The fourth respondent, the State Bank Commissioner of Louisiana, lacks even this interest as a ground of standing. He sues apparently for the benefit of all banks in Louisiana (R. 346–347). But it is by now settled that, in the absence of a statutory grant of standing, the States and their officials do not have standing to challenge the proposed actions of federal officials as *parens patriae* on behalf of their citizens. *Massachusetts* v. *Mellon*, 262 U.S. 447, 485–486; *Florida* v. *Mellon*, 273 U.S. 12, 16–17.

The National Bank Act, upon which the respondents apparently base their causes of action, does not grant competitors a statutory right to be free of competition. They are subject to the competition of all State banks and of as many additional banks as the Comptroller certifies under the National Bank Act. Nor does the Act grant competitors a judicially enforceable right to be free of the competition of banks improperly certified by the Comptroller. If Congress had intended to grant such a right, it would have authorized competitors to present their objections to the Comptroller, for that is where the alleged right would first have to be asserted. But every indication in the National Bank Act is to the contrary. There is, for example, no provision for an administrative hearing and no authorization for competitors to appear before the Comptroller; his decisions are made *ex parte* after his own informal investigation.[19] There are, moreover, no statutory provisions for judicial review; indeed there is no administrative record of the evidence and arguments upon which the Comptroller bases his action. In short, the purpose of requiring applicants to obtain a certificate authorizing the opening of a new national bank was to provide an informal administrative check on an applicant's qualification for a federal charter, not to provide a forum where competitors could protect an alleged right to be free of unauthorized competition.

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[19] Similarly, no administrative hearing is conducted when the Comptroller authorizes the opening of a new branch office. But see, *First National Bank of Smithfield* v. *Saxon*, Civ. No. 1460, Eastern District of North Carolina, decided August 10, 1964, holding that a hearing must be given to competitors objecting to a proposed branch office of a national bank.

Unless those engaged in a business have a statutory, contract, or property right to be free of competition, they have no standing to challenge an administrative action which simply increases the amount or effectiveness of competition. *Alabama Power Co.* v. *Ickes*, 302 U.S. 464, 470, 479–483; *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, 306 U.S. 118, 137–144. Any economic disadvantage to them as a result of the government's action in increasing competition is *damnum absque injuria*, and is not the kind of damage which permits an action at law or in equity. *Ibid; Singer & Sons* v. *Union Pacific R. Co.*, 311 U.S. 295.

In *Tennessee Electric Power Co.* v. *TVA*, *supra*, private electric power companies brought suit against the Tennessee Valley Authority, and three of its officers and directors, to enjoin them from selling electricity to their competitors, municipal corporations and rural cooperatives, on the ground that the unconstitutionality of the statute upon which they acted rendered their actions unlawful. This Court held that the private power companies had no right to be free from competition, and that they had no standing to challenge the "grant of power the exercise of which results in competition." 306 U.S. at 139. In rejecting the contention that a competitor has standing to challenge unlawful competition, the Court ruled (306 U.S. at 140):

> If the thesis were sound, appellants could enjoin a competing corporation or agency on the ground that its injurious competition is *ultra vires*, that there is a defect in the grant of power

> to it, or that the means of competition were acquired by some violation of the Constitution. The contention is foreclosed by prior decisions that the damage consequent on competition, otherwise lawful, is in such circumstances *damnum absque injuria*, and will not support a cause of action or a right to sue.

The holding of *Tennessee Electric Power* bars respondents' claim of standing in the present case.[20]

II

THE BRANCH-BANKING RESTRICTIONS OF THE BANKING ACT OF 1933 ARE NOT APPLICABLE TO SEPARATELY CHARTERED BANKS OWNED BY A BANK HOLDING COMPANY

As we have shown above, the district court did not have jurisdiction to entertain this action, because the Bank Holding Company Act makes the Federal Reserve Board the forum for the resolution of objections to the ownership and operation of banks by bank holding companies. This jurisdictional ground is, we believe, dispositive of the case and requires reversal of the judgment below. But the judgment below must be reversed even if the merits are reached.

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[20] The court of appeals relied upon this Court's earlier decision in *Frost* v. *Corporation Commission*, 278 U.S. 515 (Justices Brandeis, Holmes, and Stone dissenting on the issue of standing), believing that decision "sufficiently similar to be dispositive of the question of standing" (R. 468–469). In *Tennessee Electric Power*, the Court distinguished *Frost* as a case involving discrimination by a State in violation of the Fourteenth Amendment. 306 U.S. at 143. Here, as in *Tennessee Electric Power*, there is no issue of discrimination by a State in possible violation of the equal protection clause of the Fourteenth Amendment. Moreover, in the twenty-five years since the decision in *Tennessee Electric Power*, the *Frost* case apparently has not been cited with approval by this Court.

Regardless of the proper forum for determining the issue, the court below erred in applying State restrictions on the location of branch offices of a single bank to a separately chartered bank owned by a bank holding company. In enacting the Banking Act of 1933 and the Bank Holding Company Act of 1956, Congress intended to regulate branch banking separately and differently from the operations of holding companies. It specifically refused to make State geographical limitations on branch offices applicable to separately chartered banks owned or controlled by bank holding companies.

A. CONGRESS HAS LONG RECOGNIZED THE SUBSTANTIAL DIFFERENCES BETWEEN BRANCH BANKING AND THE OPERATIONS OF A BANK HOLDING COMPANY SYSTEM

1. Although multiple-unit banking systems had played an important role in American banking prior to the Civil War, that war and the National Bank Act itself encouraged the growth of independent (unit) banks, which became virtually the only form of banking in the United States in the second half of the Nineteenth Century. However, between the 1890's and the 1930's multiple unit banking of three distinct kinds grew rapidly in size and importance. One form was branch banking, a system of multiple unit banking in which each unit is merely an office of a single bank. All the units together constitute a single corporation, with a common capital structure, and identical management, officers, board of directors, and owners. A second, holding company banking, usually

called "group" banking, is a form of multiple unit banking consisting of separately chartered banks, owned or controlled by a corporation (bank holding company). Each bank retains a separate capital structure, organization, and name, and each has its own officers and directors. The third, "chain" banking consists of separately chartered banks which are owned or controlled by the same persons, but not by a single bank holding company.

Branch banking is frequently combined with chain banking and bank holding company operations; this occurs when separately chartered banks, owned or controlled by the same corporations or persons, themselves have branches.[21] The definitions of the three kinds of multiple unit banking, and the differences among them, had become settled among bankers, regulatory agencies, and other persons knowledgeable in the field by the early 1930's, and remain so today.[22]

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[21] In this case, for example, Whitney-New Orleans has eleven branches in New Orleans in addition to its main office (R. 101–102), and Whitney-Jefferson itself applied for the establishment of a branch in addition to its main office (R. 102–103). Similarly, its largest competitor, the National Bank of Commerce in New Orleans, and its affiliate, the National Bank of Commerce in Jefferson Parish, have branches (R. 65, 105–106).

[22] *E.g.*, Hearings before the House Committee on Banking and Currency on "Branch, Chain and Group Banking," 71st Cong., 2d Sess. Cartinhour, *Branch, Group and Chain Banking* (1931), pp. 54–60; Chapman, *Concentration of Banking* (1934), pp. 322–364; Fordham, *Branch Banks as Separate Entities*, 31 Col. L. Rev. 975, 976 (1931); Ostrolenk, *The Economics of Branch Banking* (1930); Willit, *Selected Articles on Chain, Group and Branch Banking* (1930); pp. 54–59; Chapman and Westerfield, *Branch Banking* (1942); Lamb, *Group Banking* (1961); Fischer, *Bank Holding Companies* (1961).

2. As noted above, group banking and chain banking involve common ownership or control of separately chartered banks. However, irrespective of ownership or control, each separately chartered bank has its own capital structure, which is separate from those of all other banks; on the other hand, all the branches of a bank have but one capital structure. Again, each separately chartered bank has its own deposits which are its liability alone, and from which it can make loans only to its own customers. In contrast, all the deposits of all the branches of a single bank are the liability of the bank, and the funds received are effectively pooled, so that all are available for investment or loan at the main office or at any branch.

The National Bank Act, like most State banking laws, imposes significant requirements on separately chartered national banks which are not imposed on the branch offices of a single bank. The Act requires each separately chartered national bank to have its capital stock promptly paid in, and prohibits the withdrawal of any portion of that capital in the form of dividends or otherwise. R.S. §§ 5138, 5140 and 5204, 12 U.S.C. 51, 53 (Supp. I) and 56. If the stock is not fully paid in, or if the capital stock has been impaired by losses or otherwise, the shareholders are liable for the deficiency *pro rata*. R.S. § 5205, 12 U.S.C. 55. Thus, each such bank must maintain its capital structure independently, regardless of its ownership by a holding company. Transfers of capital funds from one bank owned by a bank holding company to another are prohibited. In contrast, because

the branch offices of a single bank share a common capital structure, the sufficiency of its capital is measured by reference to the aggregate resources of all the offices (12 U.S.C. 36(d)), and the deposits of one branch may be withdrawn and transferred to the main office or another branch at will.

The National Bank Act imposes stringent lending and borrowing limitations upon a separately chartered bank, based upon its own capital and surplus, and wholly unrelated to the capital of affiliated banks.[23] R.S. §§ 5200 and 5202, 12 U.S.C. 84, 82. Because there is one capital structure for all the banking offices of a single bank, however, the lending and borrowing limitations of each branch are those of the bank. *Ibid.*

The National Bank Act also imposes upon separately chartered banks requirements with regard to corporate organization, composition of boards of directors and management, and termination of operations. These requirements are wholly absent in branch banking. For example, the National Bank Act requires the affairs of each separately chartered national bank to be managed by a board of directors, at least two-thirds of whom must be residents of the State in which the bank is located or within 100 miles

[23] Of course, a separately chartered bank may enter into correspondent relations with other banks to participate jointly in loans which are in excess of the individual bank's loan limit. But such relationship may exist between independently owned and operated banks, as well as between banks owned or controlled by the same bank holding company or individuals.

of the bank, and each of whom must own in his own right shares of stock the par value of which shall not be less than $1,000. R.S. §§ 5145, 5146, 12 U.S.C. 71, 72. The Act also imposes personal and individual liability upon the directors for all damages which may result from violations of the Act. R.S. § 5239, 12 U.S.C. 93. In this way management of each separately chartered bank, regardless of its ownership, is vested in a board of directors which is largely local in character and whose members have a personal stake in the ownership of the bank and personal responsibility if it is mismanaged. By contrast, because all of the branches of a bank are parts of one legal entity, there is only one board of directors, and one set of officers for the entire bank. There is no requirement that the persons managing a branch have a personal interest in the bank or personal responsibility in the event of its mismanagement. Similarly, the National Bank Act requires each separately chartered bank to give notice to the Comptroller prior to winding up its affairs; to publish such notice for two months in the local press in order to permit the assertion of claims against it; and to allow the Comptroller to examine the bank at any time, until the claims of all creditors are satisfied. R.S. §§ 5220, 5221, 12 U.S.C. 181, 182. Again in contrast, an unprofitable branch may be closed at any time by transmitting to the Comptroller a simple resolution of the bank's board of directors (or stockholders in a few cases) along with the Comptroller's certificate authorizing the branch.

B. IN ENACTING THE BANKING ACT OF 1933 AND THE BANK HOLDING COMPANY ACT, CONGRESS DELIBERATELY CHOSE TO MAKE THE GEOGRAPHICAL RESTRICTIONS ON BRANCH BANKING INAPPLICABLE TO SEPARATELY CHARTERED BANKS OWNED OR CONTROLLED BY BANK HOLDING COMPANIES

There are, to be sure, similarities as well as differences between the operation of one bank with several branches and the operation of separately chartered banks owned or controlled by a bank holding company or a person or group of persons. Each form of operation permits multiple banking offices, with common ownership and/or common control. Indeed, the organization and operation of bank holding companies is often motivated by a desire to avoid some of the legislative restrictions imposed upon branch banking.[24] Nevertheless, as we have shown above, the differences between branch banking and banking through separately chartered banks which are subject to common ownership and control are both real and substantial.

The similarities between the three kinds of multiple unit banking might well have been thought sufficient to justify a statute which treated them alike, and regulated (or limited) their growth or expansion in the same way. But, equally plainly, the differences justify a leglislative determination to regulate them

[24] See Fischer, *Bank Holding Companies* (1961), pp. 23, 138; Comptroller of the Currency, *Annual Report*, 1929, pp. 4–5. The fact that group banking continues to thrive in States like California, which have long permitted the establishment of branches without geographical restrictions, suggests however that there also are inherent advantages in group banking. See, Lamb, *Group Banking* (1961), pp. 144–169.

differently. Policy judgments pertaining to the regulation of the economy, such as the degree to which single unit or multiple unit banking should be encouraged or discouraged, and the kind and method of regulation appropriate to the several kinds of banking, are unquestionably matters for the legislature.

Congress, after extensive study and consideration, of the various kinds of multiple unit banking, decided, in the Banking Act of 1933 and again in the Bank Holding Company Act of 1956, to regulate the operations of bank holding companies in a manner entirely different from branch banking. In particular, those Acts embody a deliberate Congressional decision to make the geographical limitations on the location of branch offices inapplicable to separately chartered banks owned by bank holding companies. The court of appeals below erred in applying these limitations to the separately chartered bank involved in this case.

1. *The Banking Act of 1933.* The National Bank Act, as recast in 1864, provided for the doing of business only at the "place" and "office" specified in the articles of the association.[25] Consequently, the Comptroller of the Currency and other federal authorities consistently interpreted the Act, at least until 1922, as authorizing a national bank to do business in no more than one office, and therefore as prohibiting branch banking for national banks.[26] This Court agreed with that interpretation.[27]

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[25] R.S. §§ 5134, 5190.

[26] Chapman, *Concentration of Banking*, pp. 110-111.

[27] *First National Bank of St. Louis* v. *Missouri*, 263 U.S. 640.

As a result of the rapid growth of branch banking among State-chartered banks in the early 1900's, national banks were at a competitive disadvantage in States which permitted branch banking. Federal authorities and organizations of national bankers consequently pressed for an amendment authorizing the establishment of branches of national banks. After a legislative struggle lasting several years, Congress, in 1927, adopted the McFadden Act,[28] which authorized national banks to establish branches in the city of the parent bank if State law permitted State banks to operate branches.[29] The 1927 Act left multiple unit banking by separately chartered banks wholly unregulated.

When the host of bank failures in the period 1929–1933 revealed the need for further bank reform, the banking committees of both houses of Congress conducted extensive investigations and hearings into the national bank and Federal reserve systems, and into the various kinds of multiple unit banking.[30] Finally, in 1933, Congress, under the leadership of Senator Glass of Virginia, adopted a comprehensive bank reform statute known as the Glass-Steagall Act or the Banking Act of 1933. Act of June 16, 1933, c. 89, 48 Stat. 162. Among the twenty-five relatively distinct topics covered by the Act were the subjects of branch, chain, and group banking.

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[28] Willit, *Selected Articles on Chain, Group and Branch Banking* (1930), p. 10; Chapman and Westerfield, *Branch Banking*, pp. 84–107.

[29] Sec. 7(c), 44 Stat. 1228.

[30] Sen. Rept. 77, 73d Cong., 1st Sess., pp. 1–2; Hearings before the House Committee on Banking and Currency on "Branch, Chain and Group Banking", 71st Cong., 2d Sess.

The Act provided separate definitions for each of the three kinds of multiple unit banking. Thus, it dealt with chain banking by defining the term "affiliate" of a bank member of the Federal Reserve System to include any bank (national or State) of which control was exercised by the shareholders of a member bank, or of which a majority of directors are directors of the member bank. Sec. 2, 12 U.S.C. 221a(b). Similarly, a "holding company affiliate" was defined to include any corporation which owned or controlled a member bank. Sec. 2, 12 U.S.C. 221a(c). On the other hand, the definition of branch, to include "any branch bank, branch office, branch agency, additional office or any branch place of business" was left as it had appeared in the McFadden Act. Sec. 23, 12 U.S.C. 36(f), *infra*, p. 80.

The Banking Act of 1933 broadened the authority of national banks to engage in branch banking by authorizing the establishment of branches at any point within the State in which the national bank is located, if State law affirmatively authorizes the establishment of branches by State-chartered banks. But the establishment of branches of national banks was to be "subject to the restrictions as to location imposed by the law of the State on State banks." Sec. 23, 12 U.S.C. 36(c), *infra*, p. 79. The Act retained standards for the minimum capital necessary to establish a new branch of a national bank, and the provision that no branch of a national bank was to be established or moved without first obtaining the consent and approval of the Comptroller of the Currency. 12 U.S.C. 36 (d) and (e), *infra*, p. 80.

In regard to the other forms of multiple unit banking, Congress, in the Banking Act of 1933, chose discrete means of regulation. The Act contained provisions controlling loans to or from affiliates, prohibiting member banks from being affiliated with security underwriters, requiring reports from banks which were affiliates of national banks, and authorizing the examination of affiliates of national banks. Secs. 13, 20, 27, and 28, 12 U.S.C. 371c, 377, 161, 481. Since each of the provisions applied to affiliates, they applied alike to chain and group banks.

One provision of the Act applied only to holding companies. In order to obtain the privilege of voting stock it owned in national banks, a bank holding company was required to agree (1) to own readily marketable assets other than bank stock, in an amount equal to 25% of the aggregate par value of its bank stock, (2) to be examined by federal authorities, and (3) to divest itself of ownership of securities companies. Sec. 19, 12 U.S.C. 61. The Board of Governors of the Federal Reserve Board was authorized to grant or withhold permission to vote the national bank stock "as the public interest may require," considering such factors as the financial condition of the holding company and the general character of its management. *Ibid.* Holding companies which owned or controlled State member banks were required to agree to the same conditions and limitations. Sec. 5(c), 12 U.S.C. 337.

Despite these detailed regulatory provisions, the Act did not attempt in any way to prohibit or limit

the expansion of multiple unit banking through holding companies or chains.

That Congress deliberately chose to regulate branch banking separately and differently from the operations of holding companies or chains is fully confirmed by the legislative history of the Act. The committee reports made it clear that the different kinds of multiple unit banking were to be accorded different treatment. Sen. Rept. 77, 73d Cong., 1st Sess., pp. 9–11, 15–17; H. Rept. 150, 73d Cong., 1st Sess., pp. 3–4. Indeed, the distinctions between branch banking on the one hand, and chain and group banking on the other, was so generally recognized and accepted that Senator Glass, the chief author and sponsor of the Banking Act of 1933,[1] made the following statement on the floor of the Senate a few months before its enactment:

> Mr. President: There may now be established chain and group banking systems. There are many such systems. I am not addressing myself to anybody whose confusion of mind is such that he can not differentiate a chain and group banking system from a branch banking system. They are, of course, entirely different.[2]

2. *The Bank Holding Company Act of 1956.* Since the Banking Act of 1933 made no effort to prevent the expansion of group and chain banking,

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[1] 102 Cong. Rec. 6750; 77 Cong. Rec. 5861, 5863, 5892.

[2] 76 Cong. Rec. 1998. The statement was made in debate in regard to a bill very similar to the bill which became the Banking Act of 1933. 77 Cong. Rec. 5892.

and since it applied primarily to national banks and banks in the Federal Reserve System, its provisions were deemed inadequate by some bankers and by the federal officials concerned. From 1938 through 1955 repeated persistent efforts were made to enact legislation providing more extensive regulation of bank holding companies.[33] Beginning in the early 1950's, the Board of Governors of the Federal Reserve System recommended legislation to meet two major problems in bank holding company operations. The first was the unrestricted ability of holding companies to expand their operations. The Board was particularly concerned with the problem of monopoly—that the commercial banking facilities in an area might be concentrated under the control of a single holding company. The second problem involved participation by bank holding companies in enterprises unrelated to banking. The Board advocated legislation necessary to meet these two problems, and the Comptroller of the Currency made similar recommendations.[34] As finally enacted, the Bank Holding Company Act of 1956, largely embodied the suggestions of the Board and the Comptroller.[35]

It is important to note, however, that other proposals were afoot. In 1955 the House Committee on Banking and Currency had recommended a bill advocated by organizations representing single unit

[33] Sen. Rept. 1095, Part I, pp. 3–4.

[34] *Id.* at 194.

[35] Act of May 9, 1956, c. 240, 70 Stat. 133. See Sen. Rept. 1095, Part I, 84th Cong., 1st Sess., p. 2.

banks—one premised on the view that "Our national banking policy has aimed at protecting and fostering the growth of independent unit banks." H. Rept. 609, 84th Cong., 1st Sess., p. 2. The committee expressed its belief that bank holding companies thwart that national policy, circumvent State banking laws pertaining to branch banking, and are not conducive to economic development. *Id.*, pp. 1–2, 2–6. While recognizing that there were differences between "branches and affiliated, or subsidiary banks," the committee believed that they were "differences without a distinction," and that "the holding company device" permits the acquisition of control of banks which "can thereafter be operated, in effect, as branches." *Id.* at p. 3. Accordingly, it recommended passage of a bill which would "base holding company legislation on [State] branch banking law." *Ibid.*

Section 5 of the committee's bill required denial of any application by a bank holding company to acquire control or ownership of a bank (whether State or national), unless it was within the geographical area in which branches of State banks were permitted by State law, or unless the State law expressly authorized such acquisitions. 101 Cong. Rec. 8187. As the House report noted (H. Rept. 609, 84th Cong., 1st Sess., p. 15):

> Section 5 further provides that * * * applications within the home State could be approved only within the area within which branches of banks are permitted or where by State statute

> such expansion is specifically exempted from branch banking restrictions.
>
> The essence of section 5, your committee believes, is the placing of bank holding company expansion on the same basis as expansion in offices of banks. It establishes equity between holding companies and banks as to the area in which they can expand. * * *

In short, the House Committee bill equated branch banking and holding-company banking, and provided that the State geographical limitations of branch banking should apply to bank holding company operations.

The Federal Reserve Board, the Comptroller of the Currency, and the American Bankers Association were all emphatically opposed to the provision of the House bill which applied the geographical limitations imposed by State law on branch banking to the expansion of bank holding companies. 102 Cong. Rec. 6754. Because of the opposition to this and other provisions of the House bill, the Senate Banking Committee, in consultation with the interested agencies and banking organizations, completely rewrote many provisions of the House bill, and formulated "a compromise bill." 102 Cong. Rec. 6760.

The Senate bill provided for review of each proposal for the expansion of bank holding companies on its merits, in accordance with specified statutory factors, particularly "the prevention of undue concentration of control in the banking field." Sen. Rept. 1095, Part I, *supra*, p. 10. It centralized the authority to make such decisions in the Federal Reserve Board, subject only to the judicial review it specified. *Id.*,

pp. 8–9, 102 Cong. Rec. 6760. In particular, the Senate Committee expressly rejected the provision of the House bill which would have made State geographical limitations against branch banking applicable to the acquisition of national banks by bank holding companies. It believed that federal authorities, rather than State law, should determine whether it is in the public interest for a bank holding company to acquire ownership or control. As the Senate report stated (Sen. Rept. 1095, Part 1, 84th Cong., 1st Sess., pp. 10–11):

> * * * the bill should contain no provision leaving solely to State control determination of the question as to whether a bank holding company can acquire an interest in a national bank. *If our dual banking system is to operate as a truly dual system, the Federal authorities ought not to surrender their supervisory authority over national banks to State decision.* This is not to say the Federal authorities ought not to consider carefully the views of State authorities regarding the management and control of national banks, *but the ultimate determination of public interest in the national bank system should rest with the appropriate Federal authorities.* [Emphasis added.]

The Senate Committee agreed with the American Bankers Association that the House's approach represented "an attempt to regulate two dissimilar types of organization by laws designed specifically to apply only to one; that is, branch banking." 102 Cong. Rec. 6754. It stated (Sen. Rept. 1065, Part 1, 84th Cong., 1st Sess., p. 11):

> The committee decided against inclusion of a provision in the bill that would automatically

> apply State laws concerning branch banking to bank holding company operations. The purposes of branch banking laws are not identical with the purpose of this bill to control bank holding companies. * * * It is believed the bill contains adequate provisions to regulate bank holding company operations without an arbitrary tiein with branch banking laws.

On the floor of the Senate, Senator Robertson, the sponsor and manager of the Senate bill, explained his views and those of his committee even more explicitly (102 Cong. Rec. 6753):

> The committee also decided against the inclusion of a provision in the bill which would automatically apply State laws concerning branch banking to bank-holding company operations. This provision was contained in the House bill and was advocated by the Independent Bankers Association. *A bank branch is, by form, ownership, and functions, vastly different from a bank-holding company affiliate.* [Emphasis added.]

Senator Robertson then inserted into the Congressional Record a chart setting forth the many differences between a separately chartered bank affiliated with a bank-holding company and a branch of a single bank. 102 Cong. Rec. 6753–6754.[36]

The compromise bill formulated by the Senate Committee, and modified by it over a summer recess (Sen. Rept. 1095, Part II, 84th Cong., 2d Sess.), met with the approval of the Federal Reserve Board, the American Bankers Association, and representatives of

[36] For the convenience of the Court, we have set forth the chart, *infra*, pp. 88–91.

bank holding companies. 102 Cong. Rec. 6760. And when the Senate Committee bill was amended by the so-called Douglas amendment (discussed, *infra*, p. 58), so as to prohibit acquisitions of banks by out-of-State holding companies without the express authorization of State law (Sec. 3(d), 12 U.S.C. 1842(d), *infra*, p. 83), the Senate bill became acceptable to the representatives of single unit banks, such as the Independent Bankers Association, which had been the chief advocate of the House bill. 102 Cong. Rec. 6753, 6760, 6960. The bill was then passed by the Senate, and the Senate amendments were accepted by the House without change. 102 Cong Rec. 6964, 7161, 7165. Thus, the views of the Senate Banking Committee, rejecting the application of State branch banking laws to subsidiaries of bank holding companies, became the views of Congress, and were incorporated into the Bank Holding Company Act of 1956. 102 Cong. Rec. 7941.

* * * * *

From the foregoing legislative history, it seems to us indisputable that Congress intended applications for the acquisition or establishment of bank-holding-company subsidiaries to be reviewed by the Federal Reserve Board without giving controlling effect to State prohibitions against branch banking.[37] The

[37] We do not mean that the Federal Reserve Board would or should refuse to consider matters of State law when considering applications for acquisitions of State chartered banks. Indeed, the provision for the expression of views of State regulatory officials in such applications facilitates the Board's function in that respect. Sec. 3(b), 12 U.S.C. 1842(b). That provision is, of course, inapplicable to this case, which involves a national bank.

language of the Act embodies this intent. Section 3(c) of the Act provides the five general factors which are to be taken into account in determining whether to approve an application. None of those require reference to State law or restrictions on branch banking. Sec. 3(c), 12 U.S.C. 1842(c), *infra*, pp. 82–83. Section 3(d), 12 U.S.C. 1842(d), to be sure, adds a specific requirement that an application to acquire a bank in another State must be denied if State law does not authorize the acquisition of banks by out-of-State bank holding companies. That section, which contains the only directive referring to State law, is not applicable here; Whitney Holding Corporation has its principal office and place of business in Louisiana. Since the one carefully limited provision of the Bank Holding Company Act which directs the Board to refer to State law is completely inapplicable, and since Congress most deliberately rejected a provision which would have made State branch banking laws applicable to bank holding company operations, the court of appeals erred in holding that the restrictions of Louisiana law as to the location of offices can operate to prohibit the opening of a national bank owned by a holding company.

C. CONGRESS INTENDED TO FREE ALL BANK HOLDING COMPANY SYSTEMS FROM ANY LIMITATIONS IMPOSED BY STATE LAW ON THE LOCATION OF BRANCH OFFICES AND TO IMPOSE, INSTEAD, A WHOLLY FEDERAL SYSTEM OF REGULATION

The court below held that, although not all banks owned or controlled by bank holding companies are subject to branch banking restrictions, some should be

treated as branches. The court emphasized that in the present case the Whitney holding company system was set up for the express purpose of realizing many of the same benefits which are obtained by branch banking while avoiding the statutory regulations as to the location of branch offices. On this basis and on the ground that the Whitney Holding Corporation and its subsidiaries resembled in some ways the central and branch offices of a single bank, the court decided that branch banking provisions determine the permissible location of Whitney-Jefferson Bank. In reaching this conclusion, the court of appeals, we submit, wholly misconceived the federal scheme of regulation.

In enacting the National Bank Act, the Banking Act of 1933, and the Bank Holding Company Act of 1956, Congress, as already observed, defined the rights and obligations consequent upon the adoption of any one of three systems of multiple unit banking. The statutes leave private parties entirely free to choose among the alternatives. Congress was fully aware that many, though not all, of the benefits of multiunit banking obtainable through branch banking could also be achieved through the operation of a bank holding company system (or a "chain" system of banks owned by the same private parties). It was equally aware that the desire to obtain these benefits without becoming subject to State branch banking laws would encourage some bankers to operate through holding companies. And, knowing all of this, it nonetheless decided that banks should be free to seek and obtain

these benefits of multiple unit banking in exchange for subjecting themselves to the federal system of regulation of bank holding companies. In short, as in any number of other areas of the law, Congress left the private parties free to choose among several alternative forms of operation, each of which was subject to different regulatory provisions.

There is thus no room for an argument that Whitney-Jefferson is "in effect" a branch of Whitney-New Orleans. By operating as a separately chartered national bank, rather than as a branch office of another bank, Whitney-Jefferson becomes subject to a vast range of requirements that are not imposed on branch offices. We have spelled these out in considerable detail (*supra*, pp. 43–45). Beyond this, when the Whitney organization determined to set up a holding company system, instead of some other form of multiple unit banking, it subjected the entire system to the elaborate scheme of federal regulation of bank holding companies—a scheme in no way applicable to branch offices. As a bank holding company system, Whitney is subject to scrutiny of its operations under both the Banking Act of 1933 and the Bank Holding Company Act of 1956. 12 U.S.C. 61, 161, 377, 481; 12 U.S.C. 1844. The subsidiaries are limited in their loans and investments by the 1956 Act (12 U.S.C. 1845). Even to obtain approval of the holding company operation, Whitney was required to follow procedures and to meet requirements which are in many ways far more burdensome and restrictive than the different requirements imposed when the Comptroller

considers the establishment of a new branch. Compare 12 U.S.C. 1842, 1848, with 12 U.S.C. 36 (c) and (e).

We are aware of no decision since the enactment of the Bank Holding Company Act of 1956; aside from the decision below, which holds that a bank is not free to choose between accepting the restrictions of the Banking Act of 1933 on the establishment of branch offices and accepting the different, but surely no less complete scheme of regulation imposed by the 1956 Act on bank holding company operations. In *First National Bank in Billings* v. *First Bank Stock Corp.*, 306 F. 2d 937 (C.A. 9), the Ninth Circuit rejected a claim that a subsidiary was subject to the branch banking restrictions, but intimated in dictum that there might be circumstances in which a separately chartered bank owned by a bank holding company might be treated as a branch (306 F. 2d at 943). However, the acquisition in *Billings* was prior to the effective date of the Bank Holding Company Act, with its discreet and comprehensive system of regulation. Moreover, the holding of the case—that the separately chartered bank was not a branch—was based upon factors, such as separate capital structure, loan limits, and books of account, which are written into the governing Federal statutes and are present in the case of every separately chartered bank.

It is thus clear that Congress did not intend that the Federal Reserve Board should analyze holding company acquisitions by reference to the branch banking limitations of State law. It rejected a House bill which had that objective. It adopted, instead, its

743-143—64——6

own list of criteria which the Federal Reserve Board is to consider in passing upon an acquisition. The Board, however, is not directed to consider either the intimacy of the relationship proposed between a newly acquired subsidiary and its parent holding company or the variant policies reflected in State branch-banking laws. 12 U.S.C. 1842 (c) and (d).

It is only necessary to add, by way of conclusion, that even if a case-by-case analysis of the proposed relationship of a subsidiary to its parent bank were appropriate, there are no facts peculiar to this case which would take Whitney Holding Corporation and Whitney-Jefferson out of the general categories Congress was considering when it decided that branch-banking restrictions should be inapplicable to holding company operations. As we have noted above, Congress knew that bank holding company operations are frequently motivated by the desire to enjoy the benefits of multiple unit operations without incurring the geographical limitations applicable to branch offices. That Whitney Holding Corporation had this end in view neither distinguishes this case nor removes it from the scheme of the Bank Holding Company Act.

The court of appeals also stated that the Whitney management intended to operate Whitney-Jefferson and Whitney-New Orleans "in the same way as if the institutions were one" (R. 475). We agree with Whitney that if intent is material, there was a genuine issue of material fact which could not be decided, as this case was, on summary judgment. But we believe that this consideration was plainly irrelevant. There

is no contention that Whitney Holding Corporation intended to ignore either any of the wide range of requirements imposed on a separately chartered bank, but not on a branch office, or any of the restrictions applicable to bank holding companies but not to branch office operations. We assume, as did Congress, that a primary function of a bank holding company operation is to create centralized control and uniform banking policies for several banking units. But again, that can be no excuse for departing from the scheme of the controlling statute.

The emphasis of the court below on the fact that the banks would have similar or related managements and the same ownership was similarly misconceived; these are the very hallmarks of the great majority of bank holding company operations. The only other factor which the court felt might distinguish this case from the typical holding company operation was the fact that the capital to be used by one subsidiary (Whitney-Jefferson) came from the operations of another subsidiary (Whitney-New Orleans). This, however, is commonplace even in the expansion of a long-established holding company system; management frequently uses the profits the parent has obtained from the operation of its older subsidiaries to acquire or establish a new subsidiary.

In short, the Whitney Holding Corporation operations would differ in no material respect from the type of operations Congress had in mind in passing the Bank Holding Company Act of 1956. The scheme of federal regulation is to allow a bank such as Whitney

to decide for itself whether to accept the regulations and restrictions imposed by federal law on bank holding companies or the alternative schemes of regulation imposed on branch offices or "chain" affiliates. Whitney chose to operate under the Bank Holding Company Act of 1956. This decision freed it from the restrictions imposed by other statutes on other systems of operation.

III

THE LOUISIANA STATUTE PROHIBITING THE OPERATION OF BANK HOLDING COMPANIES DOES NOT PROVIDE A BASIS FOR AFFIRMANCE

Although the decision of the court of appeals was based solely upon the application of the branch banking limitations of State law, respondents, in their briefs in opposition, argued that the decision should be sustained on an alternative ground: the passage of a newly enacted Louisiana statute prohibiting bank holding companies from opening banks in that State. Louisiana Act 275 of 1962 (La. R.S. § 6:1001–1006 (1963 Supp.), *infra*, p. 85) makes it unlawful for any bank holding company "to open for business any bank not now opened for business." This statute, together with Section 7 of the Bank Holding Company Act, 12 U.S.C. 1846 (*infra*, p. 84), which preserved to each State "such powers and jurisdiction which it now has" with regard to banks and bank holding companies, provide the statutory bases for this argument.

In our view the issue of the applicability of a State law prohibiting the opening of a national bank

by a bank holding company, like all other challenges to the acquistion and operation of a bank based upon its proposed ownership by a bank holding company, must be raised and decided in the administrative and judicial proceedings provided by the Bank Holding Company Act. But even if this issue could properly be raised in a district court suit against the Comptroller, the judgment below cannot be defended on that ground. The Louisiana law prohibiting the opening of a new national bank is in flat conflict with the National Bank Act.

A. A DISTRICT SUIT AGAINST THE COMPTROLLER OF THE CURRENCY IS NOT THE PROPER FORUM FOR DETERMINING THE VALIDITY OF A STATE LAW PROHIBITING THE OPENING OF A NATIONAL BANK BY A BANK HOLDING COMPANY

1. We have shown above (pp. 19–40) that the district court was without jurisdiction to entertain this action because the Bank Holding Company Act of 1956 makes the Federal Reserve Board, and, upon judicial review, the appropriate court of appeals the sole tribunals for resolution of all objections, based upon ownership and control, to the acquisition and operation of a national bank by a bank holding company. Each of the considerations advanced there is pertinent here.

The immediate issue is whether Section 7 of the Bank Holding Company Act authorizes the States to prohibit the opening of a national bank within its borders because it is owned by a bank holding company (see, *infra*, pp. 69–74). It is particularly appropriate that a statutory question of this kind should be resolved before the tribunals which Congress chose

to administer and interpret the Bank Holding Company Act, and by the procedure specified by that Act. The Louisiana State Bank Commissioner had both notice and actual knowledge of the proceedings before the Federal Reserve Board, in ample time to make his views known to that body (R. 161). Whether or not his request for reconsideration (see p. 9, *supra*) was a timely presentation of his position, he and the State were bound by the Federal Reserve Board's decision, unless and until it was reversed or vacated by the appropriate court of appeals, under the procedure specified for judicial review. *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320; and see *supra*, pp. 29–36.

The fact that Louisiana did not pass the statute on which respondents rely until after the Board had approved the Whitney program in no way detracts from the finality of the Board's determination or the exclusiveness of the judicial remedy provided by the Bank Holding Company Act. If respondents believed that the subsequently enacted Louisiana statute rendered illegal or improper the Whitney proposal to acquire and operate a new bank in Jefferson Parish, they should have presented that issue to the Court of Appeals for the Fifth Circuit. For that court had broad authority, under the Bank Holding Company Act "to affirm, set aside, or modify the order of the Board and *to require the Board to take such action with regard to the matter under review as the court deems proper.*" Emphasis added, Section 9, 12 U.S.C. 1848, *infra*, p. 84. In our view, the subsequent Louisiana statute has no proper role in deter-

mining the lawfulness of the Whitney proposal;[38] but there can, we believe, be little doubt that under the Bank Holding Company Act the proper forum for resolving that issue was the Court of Appeals for the Fifth Circuit, in the judicial review proceedings which the Act specifies. See *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320.

2. The suit against the Comptroller of the Currency suffers from still another defect: the statute under which the Comptroller proceeds does not authorize him to consider the issue of State law which respondents seek to raise.

The National Bank Act does not authorize the Comptroller to deny a certificate on grounds that the applicant has not complied with State law. His sole function is to ascertain that a proposed bank has complied with the applicable provisions of federal law. In particular, he is directed to (12 U.S.C. 26):

> examine into the condition of such association, ascertain especially the amount of money paid in on account of its capital, the name and place of residence of each of its directors, and the amount of the capital stock of which each is the owner in good faith, and generally whether such association has complied with all the provisions of this chapter required to entitle it to engage in the business of banking * * *.

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[38] A duly authorized Federal license or permit necessarily carries with it the authority to act under that license or permit, despite conflicting State laws, whether these be pre-existing or later-enacted. *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 338–339; *Seattle* v. *Beezer*, 376 U.S. 224.

It is no part of the Comptroller's functions to certify that the proposed bank has complied with all the provisions of State law, if indeed such provisions can be applied to national banks at all. The federal banking statutes do, on occasion, direct the Comptroller of the Currency to apply, *as a rule of federal law*, various State statutes such as State prohibitions on the location of branch offices. But it is only those State provisions which are incorporated as matters of federal law that the Comptroller is to consider. His certificate is a certificate of compliance with federal law, and that alone (R. 311), and there is no provision of federal law which states that a new bank shall not be certified as in compliance with federal law if its opening is prohibited by a State statute.

It is therefore clear that the Comptroller of the Currency is not authorized, much less required, to determine the applicability of State statutes before certifying compliance with federal law and authorizing the national bank to begin operation. To the extent that State statutes can constitutionally be applied to a national bank or its stockholders, they can now be given effect by the Federal Reserve Board. See pp. 22-26, *supra*. But prior to 1956, State law could only have been applied in direct proceedings by State officials against these parties.[39]

[39] Indeed, even if the Comptroller were to consider the applicability of a particular State statute, his *ex parte* determination would not be binding on the State courts or on the State enforcement officials. The Louisiana statute itself, as the court of appeals noted, purports to outlaw the opening of a national bank even if the Comptroller of the Currency has already issued the certificate of authority to commence the business of banking.

B. A STATE STATUTE PROHIBITING THE OPENING OF A NATIONAL BANK OWNED BY A BANK HOLDING COMPANY IS NOT AUTHORIZED BY THE BANK HOLDING COMPANY ACT, AND IS IN CONFLICT WITH THE NATIONAL BANK ACT

1. The National Bank Act provides for the organization and operation of national banks, which are, of course, instrumentalities of the federal government created by that Act to serve vital federal purposes. *Mercantile National Bank at Dallas* v. *Langdeau*, 371 U.S. 555, 558; *Franklin National Bank v. New York*, 347 U.S. 373, 375. Consonant with the need for a sound, uniform national banking system which led to its enactment, the Act confers upon national banks, when organized, all such "powers as shall be necessary to carry on the business of banking." 12 U.S.C. 24, *infra*, pp. 76–77. The Act is a self-contained whole allowing the federal government to create national banks when and as it deems necessary. This federal power has never been subject to the possibly conflicting purposes of State law.

The Act contains its own complete set of requirements for going into business as a national bank. The substantive prerequisites for certification of a national banking association are provided by the statute and it alone. These include, for example, requirements as to the amount of paid-in capital, and the citizenship, residence, and stock ownership of directors. See, generally, 12 U.S.C. 51–67, 71–78, and *supra*, pp. 43–45. The formal procedures to be followed are also fully set out in the National Bank Act. The Act requires that the applicant first become a "national banking association" whose powers are speci-

fied by the statute. Prior to opening, the national banking association must notify the Comptroller that it has "complied with all the provisions of this chapter." The Comptroller is then to conduct an investigation to determine whether the applicant has in fact complied "with all the provisions of this title"—*i.e.*, with all the applicable provisions of federal statutes. If the applicant has, the Comptroller is directed to issue a certificate so stating and authorizing the bank to open for business.

The Comptroller's certificate has always stated only that the applicant has complied "with all provisions of the statutes of the United States"; under the National Bank Act nothing more is required for the applicant to become a national banking association entitled to do business as such within the States. In particular, the applicant is not required to satisfy any additional requirements imposed by State law. As this Court has said, "The National Bank Act constitutes 'by itself a complete system for the establishment and government of National Banks'." *Deitrick* v. *Greaney*, 309 U.S. 190, 194; *Cook County Nat. Bank* v. *United States*, 107 U.S. 445, 449.

We believe it is clear, both from the terms and purposes of the National Bank Act and from this Court's precedents, that a State has no power to prohibit the opening of a national bank, or to condition its right to open on compliance with State requirements differing from those imposed by Congress. Indeed, since *McCulloch* v. *Maryland*, 4 Wheat. 316, upheld the right of the federal govern-

ment to maintain an integrated national banking system free of State interference, this Court has regularly held invalid State laws which, though they do not go as far as to deny the right of national banks to operate within a State, would nonetheless impair their ability to perform their federal functions. *Mercantile National Bank at Dallas* v. *Langdeau*, 371 U.S. 555, 558–559. See, for example, *Franklin National Bank* v. *New York*, 347 U.S. 373 (State statute prohibiting a national bank from using the word "saving" in its name); *Farmers' and Mechanics' Nat. Bank* v. *Dearing*, 91 U.S. 29, 33–34 (State prohibition of loans above State-prescribed rate of interest); *Davis* v. *Elmira Savings Bank*, 161 U.S. 275, 283, and *Jennings* v. *U.S. Fidelity & Guaranty Co.*, 294 U.S. 216, 225–226 (State priorities on distribution of assets); *Easton* v. *Iowa*, 188 U.S. 220, 229–231 (State prohibition of accepting deposits when insolvent); *First National Bank* v. *California*, 262 U.S. 366 (provision for escheat to State of unclaimed bank deposits).

Under these precedents, it is clear that Louisiana is without power to deny the federal government the right to open a new national bank within the State's borders. Indeed, it would be difficult to conceive of State legislation which would more effectively interfere with the ability of national banks to discharge their federal duties than a statute which would prevent them from opening their doors. This is precisely what Section 3(5) of Louisiana Act 275 of 1962 purports to do. It forbids a national bank owned by

a bank holding company "to open for business * * * whether or not a charter * * * or certificate * * * has already been issued" permitting it to do so. La. R. S. 6:1003, *infra*, p. 85. If applied to national banks, the State law takes away exactly what is granted by the applicable provisions of the National Bank Act (R. S. §§ 5136, 5168, 5169, 12 U.S.C. 24, 26, and 27), namely the authority to engage in the business of banking. As applied to national banks, the Louisiana statute is therefore invalid; it is in conflict with the National Bank Act and, under the Supremacy Clause of the Federal Constitution, must yield.[40]

2. Unlike the National Bank Act, the Bank Holding Company Act of 1956 does not limit State power. Section 7 provides that the enactment of the Act should "not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof." Prior to its enactment a State had power to deny a State charter to a bank because it was owned by a bank holding company (just as it could deny a charter because of ownership by a union or manufacturing corporation). After 1956 the States retained that same power, although the Bank Holding Company Act imposed an additional system of fed-

[40] This is not to suggest that the National Bank Act denies the States power to regulate the operations of State-chartered banks. Thus a State may validly deny a State charter to a bank on the ground that it is owned by a labor union, or manufacturing corporation, although it cannot prohibit the operation of a national bank on these grounds.

eral regulation on bank holding companies and their State bank (or national bank) subsidiaries. Similarly, the 1956 Act did not limit State power over bank holding companies which are State corporations. A State could, prior to 1956, prohibit a local bank holding company from acquiring the stock of more than three State banks or from acquiring the stock of subsidiaries chartered by other States. After 1956, it retained the same power.

Respondents contend that Section 7 of the Bank Holding Company Act did far more than preserve such State authority as existed prior to 1956. They assert that, even if the States lacked power to prohibit the opening of a national bank prior to 1956, Section 7 granted this power whenever the ground of the prohibition was that the national bank was owned by a bank holding company. This contention is rebutted by the legislative history of the section as well as by its careful wording.

An earlier draft of Section 7 had stated that a State could, "within the limits of its proper jurisdictional authority," be more restrictive in regard to the operation of bank holding companies within their borders than the federal authorities or law would be. Sen. Rept. No. 1095, Part 1, 84th Cong., 1st Sess., p. 11. This provision caused concern that the section actually conferred new authority upon the States in regard to national banks generally, and the acquisition of their stocks in particular. In order to make it clear that the bill was intended to confer no new authority upon the States, Section 7 was rewritten

to provide simply that the bill should not be construed as preventing any State from exercising such powers as it had at the time of enactment, or that it may thereafter acquire. In connection with this amendment, the Senate Committee explained:

> In order to clarify the legislative history of Section 7, the committee wishes to emphasize that this section *does not grant any new authority to States over national banks.* The purpose of the section is to preserve to the States *those powers which they now have in our dual banking system.* It is always of uppermost importance in legislation of this nature to preserve the dual system of National and State banks, and section 7 must be viewed in that light. [Emphasis added.][41]

Throughout our history no State has ever had the power to prevent a national bank from opening its doors.[42]

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[41] Sen. Rept. 1095, Part II, 84th Cong., 2d Sess., p. 5; 102 Cong. Rec. 6758.

[42] A different and more difficult question was presented in *Braeburn Securities Corp.* v. *Smith*, 15 Ill. 2d 55, 153 N.E. 2d 806, appeal dismissed, 359 U.S. 311; and *Opinion of the Justices*, 151 A. 2d 236 (N.H.). There, the State statutes did not prohibit the opening or operation of a federal instrumentality, *i.e.*, a national bank authorized to do business by federal law and holding a federal charter. Instead, they operated upon the holding-company shareholders who were subject to State jurisdiction, forbidding them from acquiring the stock of the national banks. Contrary to the holdings of these cases, we do not believe that the States have power to prohibit the acquisition or retention of shares of a national bank. Be that as it may, as Whitney demonstrates at pp. 48–51 of its brief, that is a quite different issue from the one presented here, and there is no occasion to resolve it in the present litigation.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgments of the court of appeals should be reversed.

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APPENDIX A

1. The Constitution of the United States provides in pertinent part, Article VI, cl. 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

2. The National Bank Act provides in pertinent part:

> a. R.S. § 5136, as amended, 12 U.S.C. 24:
>
> Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—
>
> First. To adopt and use a corporate seal.
>
> Second. To have succession from February 25, 1927, or from the date of its organization if organized after February 25, 1927, until such time as it be dissolved by the act of its shareholders owning two-thirds of its stock, or until its franchise becomes forfeited by reason of violation of law, or until terminated by either a general or special Act of Congress or until its affairs be placed in the hands of a receiver and finally wound up by him.
>
> Third. To make contracts.
>
> Fourth. To sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons.

Fifth. To elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places.

Sixth. To prescribe, by its board of directors, by-laws not inconsistent with law, regulating the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted, and the privileges granted to it by law exercised and enjoyed.

Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this chapter. * * *

b. R. S. § 5139, as amended, 12 U.S.C. 52:

The capital stock of each association shall be divided into shares of $100 each, or into shares of such less amount as may be provided in the articles of association, and be deemed personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association. Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all rights and liabilities of the prior holder of such shares; and no change shall be made in the articles of association by which the rights, remedies, or security of the existing creditors of the association shall be impaired. * * *

c. R. S. § 5168, 12 U.S.C. 26:

"Whenever a certificate is transmitted to the Comptroller of the Currency, as provided in this Title, and the association transmitting the same notifies the Comptroller that at least fifty per centum of its capital stock has been duly paid in, and that such association has complied with all the provisions of this Title required to be complied with before an association shall be authorized to commence the business of banking, the Comptroller shall examine into the condition of such association, ascertain especially the amount of money paid in on account of its capital, the name and place of residence of each of its directors, and the amount of the capital stock of which each is the owner in good faith, and generally whether such association has complied with all the provisions of this Title required to entitle it to engage in the business of banking; and shall cause to be made and attested by the oaths of a majority of the directors, and by the president or cashier of the association, a statement of all the facts necessary to enable the Comptroller to determine whether the association is lawfully entitled to commence the business of banking.

d. R. S. § 5169, 12 U.S.C. 27:

If, upon a careful examination of the facts so reported, and of any other facts which may come to the knowledge of the Comptroller, whether by means of a special commission appointed by him for the purpose of inquiring into the condition of such association, or otherwise, it appears that such association is lawfully entitled to commence the business of banking, the Comptroller shall give to such association a certificate, under his hand and official seal, that such association has complied with all the provisions required to be complied with before commencing the business of banking, and that such association is authorized to commence such business. But the Comptroller

may withhold from an association his certificate authorizing the commencement of business, whenever he has reason to suppose that the shareholders have formed the same for any other than the legitimate objects contemplated by this Title.

e. R. S. § 5155, as amended by Section 23 of the Banking Act of 1933, 12 U.S.C. 36:

The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:

* * * * *

(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. In any State in which State banks are permitted by statute law to maintain branches within county or greater limits, if no bank is located and doing business in the place where the proposed agency is to be located, any national banking association situated in such State may, with the approval of the Comptroller of the Currency, establish and operate, without regard to the capital requirements of this section, a seasonal agency in any resort community within the limits of the county in which the main office of such association is located, for the purpose of receiving and paying out deposits, issuing and cashing

checks and drafts, and doing business incident thereto: *Provided,* That any permit issued under this sentence shall be revoked upon the opening of a State or national bank in such community. * * *

(d) The aggregate capital of every national banking association and its branches shall at no time be less than the aggregate minimum capital required by law for the establishment of an equal number of national banking associations situated in the various places where such association and its branches are situated.

(e) No branch of any national banking association shall be established or moved from one location to another without first obtaining the consent and approval of the Comptroller of the Currency.

(f) The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

3. The Bank Holding Company Act of 1956 (Act of May 9, 1956, 70 Stat. 133), provides in pertinent part:

a. Section 2, 12 U.S.C. 1841:

(a) "Bank holding company" means any company (1) which directly or indirectly owns, controls, or holds with power to vote, 25 per centum or more of the voting shares of each of two or more banks or of a company which is or becomes a bank holding company by virtue of this Act, or (2) which controls in any manner the election of a majority of the directors of each of two or more banks, or (3) for the benefit of whose shareholders or members 25 per centum or more of the voting shares of each of two or more banks or a bank

holding company is held by trustees; and for the purposes of this Act, any successor to any such company shall be deemed to be a bank holding company from the date as of which such predecessor company became a bank holding company. * * *

* * * * *

(c) "Bank" means any national banking association or any State bank, savings bank, or trust company, but shall not include any organization operating under sections 611 and 612 of this title, or any organization which does not do business within the United States. "State member bank" means any State bank which is a member of the Federal Reserve System. "District bank" means any State bank organized or operating under the Code of Law for the District of Columbia.

* * * * *

b. Section 3, 12 U.S.C. 1842:

(a) Prior approval of Board as necessary; exceptions.

It shall be unlawful except with the prior approval of the Board (1) for any action to be taken which results in a company becoming a bank holding company under section 1841(a) of this title; (2) for any bank holding company to acquire direct or indirect ownership or control of any voting shares of any bank if, after such acquisition, such company will directly or indirectly own or control more than 5 per centum of the voting shares of such bank; (3) for any bank holding company or subsidiary thereof, other than a bank, to acquire all or substantially all of the assets of a bank; or (4) for any bank holding company to merge or consolidate with any other bank holding company. * * *

(b) Upon receiving from a company any application for approval under this section, the Board shall give notice to the Comptroller of

the Currency, if the applicant company or any bank the voting shares or assets of which are sought to be acquired is a national banking association or a District bank, or to the appropriate supervisory authority of the interested State, if the applicant company or any bank the voting shares or assets of which are sought to be acquired is a State bank, and shall allow thirty days within which the views and recommendations of the Comptroller of the Currency or the State supervisory authority, as the case may be, may be submitted. If the Comptroller of the Currency or the State supervisory authority so notified by the Board disapproves the application in writing within said thirty days, the Board shall forthwith give written notice of that fact to the applicant. Within three days after giving such notice to the applicant, the Board shall notify in writing the applicant and the disapproving authority of the date for commencement of a hearing by it on such application. Any such hearing shall be commenced not less than ten nor more than thirty days after the Board has given written notice to the applicant of the action of the disapproving authority. The length of any such hearing shall be determined by the Board, but it shall afford all interested parties a reasonable opportunity to testify at such hearing. At the conclusion thereof, the Board shall by order grant or deny the application on the basis of the record made at such hearing.

(c) Factors governing determination of application for approval.

In determining whether or not to approve any acquisition or merger or consolidation under this section, the Board shall take into consideration the following factors: (1) the financial history and condition of the company or companies and the banks concerned; (2) their prospects; (3) the character of their management; (4) the convenience, needs, and wel-

fare of the communities and the area concerned; and (5) whether or not the effect of such acquisition or merger or consolidation would be to expand the size or extent of the bank holding company system involved beyond limits consistent with adequate and sound banking, the public interest, and the preservation of competition in the field of banking.

(d) Limitation by State boundaries.

Notwithstanding any other provision of this section, no application shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside the State in which such bank holding company maintains its principal office and place of business or in which it conducts its principal operations unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication.

* * * * *

c. Section 6, 12 U.S.C. 1845:

(a) From and after the date of enactment of this Act, it shall be unlawful for a bank—

(1) to invest any of its funds in the capital stock, bonds, debentures, or other obligations of a bank holding company of which it is a subsidiary, or of any other subsidiary of such bank holding company;

(2) to accept the capital stock, bonds, debentures, or other obligations of a bank holding company of which it is a subsidiary or any other subsidiary of such bank holding company, as collateral security for advances made to any person or company: *Provided, however,* That any bank may accept such capital stock, bonds, debentures, or other obligations as se-

curity for debts previously contracted, but such collateral shall not be held for a period of over two years;

(3) to purchase securities, other assets or obligations under repurchase agreement from a bank holding company of which it is a subsidiary or any other subsidiary of such bank holding company; and

(4) to make any loan, discount or extension of credit to a bank holding company of which it is a subsidiary or to any other subsidiary of such bank holding company.

d. Section 7, 12 U.S.C. 1846:

The enactment by the Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof.

* * * * *

e. Section 9, 12 U.S.C. 1848:

Any party aggrieved by an order of the Board under this chapter may obtain a review of such order in the United States Court of Appeals within any circuit wherein such party has its principal place of business or in the Court of Appeals in the District of Columbia, by filing in the court, within sixty days after the entry of the Board's order, a petition praying that the order of the Board be set aside. A copy of such petition shall be forthwith transmitted to the Board by the clerk of the court, and thereupon the Board shall file in the court the record made before the Board, as provided in section 2112 of Title 28. Upon the filing of such petition the court shall have jurisdiction to affirm, set aside, or modify the order of the Board and to require the Board to take such action with regard to the matter under review as the court deems proper. The findings of the Board as to the facts, if supported by substantial evidence, shall be conclusive.

4. Louisiana Act No. 275 of 1962, provides in pertinent part:

§ 2 [La. Rev. Stat., Ch. 12, Title 6, § 1002.] Definitions.

(A) "Bank holding company" means any company, foreign or domestic, including a bank,

(1) which directly or indirectly owns, controls, or holds with power to vote, 25 per centum or more of the voting shares of any bank, or

* * * * * *

§ 3 [La. Rev. Stat., Ch. 12, Title 6, § 1003.] It shall be unlawful:

(1) for any action to be taken which results in a company or a bank becoming a bank holding company as defined in this Chapter,

(2) for any bank holding company or subsidiary thereof to acquire direct or indirect ownership or control of any voting shares of any bank if, after such acquisition, such company or subsidiary will directly or indirectly own or control more than 25 per centum of the voting shares of such bank;

(3) for any bank holding company or subsidiary thereof to acquire all or substantially all of the assets of a bank; or

(4) for any bank holding company or subsidiary thereof to open for business any bank not now opened for business, whether or not, a charter, permit, license or certificate to open for business has already been issued. Notwithstanding the foregoing, this prohibition shall not apply to additional shares acquired by a bank holding company in a bank in which such bank holding company owned or controlled a majority of the voting shares prior to such acquisition.

5. Regulation Y of the Board of Governors of the Federal Reserve System, adopted pursuant to the Bank Holding Company Act, 12 C.F.R. 222, provides in pertinent part:

> Section 222.4
>
> (e) *Procedure on applications.* (1) A Federal Reserve Bank receiving an application under this section will retain one copy thereof and will forward all other copies to the Board. If either the applicant or the bank the voting shares or assets of which are sought to be acquired is a national bank or a District bank, the Board will transmit a copy of the application to the Comptroller of the Currency. If either the applicant or the bank the voting shares or assets of which are sought to be acquired is a State bank, the Board will transmit a copy of the application to the bank supervisory authority of the State in which such bank is located.
>
> (2) Following the receipt of an application under this section, the Board will publish in the Federal Register a notice of such receipt, stating the names and addresses of the applicant and the bank or banks involved, indicating the general nature of the proposed transaction, and allowing 30 days (or a shorter period in exceptional circumstances) for the submission of written comments or views. Such comments or views shall be submitted to the Board or to the Federal Reserve Bank for transmission to the Board.
>
> Section 222.7
>
> (a) *Hearings.* In addition to hearings required by the Act (see § 222.4(f) and § 222.5 (b)), a hearing may be ordered by the Board in its discretion with respect to any application or request under this part, either upon its own motion or upon the request of any

party in interest, if the Board deems such hearing to be in the interests of the parties or the public interest. Notice of any hearing required by the act will be published in the Federal Register a reasonable time in advance of the date fixed for the hearing; and any hearings so required will ordinarily be held before trial examiners appointed in accordance with the provisions of the Administrative Procedure Act. All hearings under this part will be conducted in accordance with Part 263 of this chapter (Rules of Practice for Formal Hearings).

(b) *Record of proceedings.* The record in any proceeding under this part upon which an order of the Board is based shall consist of the application or request filed with the Board in connection with such proceeding; any views and recommendations received by the Board from the Comptroller of the Currency or the appropriate State supervisory authority pursuant to section 3(b) of the act; the transcript of any hearing held with respect to such application or request and any report and recommendation made by the trial examiner or hearing officer before whom such hearing was held; any other document or writing relied upon by the Board in making disposition of the matter; and any order of the Board granting or denying the application or request.

(c) *Parties.* A Party to any proceeding under this part shall include any person or agency named or admitted as a party or any person who has filed a request in writing to be admitted as a party and who is entitled as of right to be admitted.

APPENDIX B

(102 Cong. Rec. 6753–6754)

COMPARISION OF BRANCH BANKING AND HOLDING COMPANY OPERATIONS

Branch Banking	Holding Company Operation
Corporate Organization	*Corporation Organization*
One legal entity created under a single charter covering the main office of bank and all its branches.	Two or more separate legal entities each created under a separate charter, one for each bank affiliate.
Stockholders	*Stockholders*
Possess the same stockholders.	Possess different set of stockholders for each affiliate.
Supervision	*Supervision*
Main office of bank and all branches are under supervision of the identical authority as provided by the laws under which organized. Could be either Federal or State laws.	Each affiliate individually is subject to supervision under the laws under which it was separately organized. Some affiliates could be organized under State laws and others under Federal laws.
Main office and all branches also would be subject to supervision of Federal Reserve System if a member or FDIC if insured.	Each affiliate may or may not be subject to supervision of Federal Reserve System or FDIC, depending if such affiliate is a member of the Federal Reserve System or if insured in the FDIC.
	If a holding company controls both national and State member banks and procures a voting permit, then the holding company, as well as all of its affiliated nonmember State banks are subject to examination by and reporting of the Comptroller of the Currency and the Federal Reserve Board.

Branch Banking

Board of Directors

One board of directors.

Holding Company Operation

Board of Directors

A separate board for each affiliate. Statutes commonly impose residence requirement.

For example, national banking laws require that every director, during his whole term of service must be a citizen of the United States, and at least three-fourths of the directors must have resided in the State, Territory, or district in which the association is located, or within 50 miles of the location of the office of the association for at least 1 year immediately preceding their election, and must be residents of such State or reside within a 50-mile territory of the location of the association during their continuance in office.

Each director must own stock in the association, the aggregate par value of which shall be at least $1,000, unless the capital of the bank does not exceed $25,000, in which case he shall own not less than $500.

Any director ceasing to own the required number of shares, shall vacate his place.

Management	*Management*
Amounts to absentee management by officers of main office and board of directors. Officers in charge usually have limited powers.	Affiliates are local institutions managed by local board of directors and officers. May have some supervision and assistance on loan and investment overall policies from holding company.
Branch Banking	Holding Company Operation
Capital structure	*Capital structure*
Single capital structure for main office and all its branches.	Separate capital structure for each affiliate. Changes in capital are subject to the supervisory authority having jurisdiction over each affiliate.
Deposits	*Deposits*
All deposits pooled as deposit liability of and available for investment or loans by the bank through main office or any of its branches.	Each affiliate has its own deposits which are its sole liability, and which such affiliate alone can invest or loan from its own office and to its own customers.
Loan limit	*Loan limit*
Loan limit based upon capital and surplus applies to the aggregate of all loans made at main office and at all branches. (In case of National Banks the limit is 10 percent of capital and surplus.)	Each affiliate has its own loan limit based upon its own capital and surplus. This limit has no relation to capital and surplus of any or all of the other affiliate banks and the holding company. An affiliate has a special restriction imposed by section 24 of the Federal Reserve Act with respect to loans to other affiliates.

As a result a small branch in an industrial section can handle the loan requirements of large customers up to the total limit permitted of the whole branch banking operation. Consequently the branch usually carries the deposit accounts of such customers.

Loanable funds

Each branch has access to entire capital funds and deposits of the bank (main office) and all branches. Consequently a branch might lend more than the total deposits of that particular branch.

Branch Banking

Termination

Branch can be closed at any time if unprofitable. All that is required to close a national bank branch is a resolution of the board of directors or of the stockholders, if branch is described in articles of association, and the transmittal to the comptroller of such resolution together with certificate authorizing the branch.

An affiliate in an industrial section can only handle the loan requirements of a customer up to its individual limits. Consequently substantial deposits of the customer usually go to a larger bank or branch banking operation with larger loan limits.

Loanable funds

Each affiliate has available for loans only its own capital funds and deposits. This parallels the situation of independent banks. An affiliate therefore is dependent upon correspondent banks to share excess loans.

Holding Company Operation

Termination

Requires voluntary liquidation of affiliate according to provisions of the State or Federal laws under which it was chartered.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

WHITNEY NATIONAL BANK IN JEFFERSON PARISH,
Petitioner,

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL.,
Respondents.

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY,
Petitioner,

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL.,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF SUPERVISORS OF STATE BANKS

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INDEX

	Page
INTRODUCTION	2
QUESTIONS PRESENTED	6
STATUTES INVOLVED AND STATEMENT OF THE CASE	6
SUMMARY OF ARGUMENT	6
ARGUMENT	10
I. The issuance of a certificate of authority to Whitney-Jefferson would constitute an unlawful evasion of the provisions of Section 36(c) of the National Bank Act	10
A. In the National Bank Act Congress has adopted a "policy of equalization" between National and State banks	10
B. Nowhere has the Congressional "policy of equalization" been more forcefully expressed in the National Bank Act than in Section 36(c) wherein Congress required the Comptroller to follow State law as the standard for the establishment of branches of National banks	16
C. A certificate issued to Whitney-Jefferson would violate the positive, unequivocal and dominant expression of Congressional intent to insure equality between National and State banks in the matter of branching. Accordingly, the corporate veil of the intricate transaction here attempted should be pierced, and Whitney-Jefferson revealed as a forbidden branch of Whitney-New Orleans	26
D. The arguments advanced by Petitioners that Congress intended, or contemplated, an avoidance of State branch law by the transaction here involved are without merit	31

Page

II. The issuance of a certificate of authority to Whitney-Jefferson would also be in violation of Section 3(5) of Louisiana Law 275 of 1962, enacted under a reservation of power from Congress to a state to prohibit or restrict the growth of bank holding companies incorporated under the laws of that State 40

A. In Section 7 of the Bank Holding Company Act, Congress has clearly and unequivocally expressed its intent that a State may prohibit, or restrict the expansion of, bank holding companies and their subsidiaries, whether National or State banks 41

B. Section 3(5) of Louisiona Law 275 of 1962 was enacted pursuant to Section 7 of the Bank Holding Company Act and is constitutional 45

CONCLUSION 50

APPENDIX A—Summary of Branch Banking Statutes of the 50 States 52

APPENDIX B—Summary of State Laws Affecting Bank Holding Companies (1963) 57

APPENDIX C—Summary of State Laws Restricting or Prohibiting Bank Holding Companies Prior to the Passage of the Bank Holding Company Act of 1956 60

APPENDIX D—Georgia Bank Holding Company Act of 1956 61

TABLE OF CITATIONS

CASES:

Anderson v. *Abbott*, 321 U.S. 349 (1944) ..8, 28, 29, 30, 32

Anderson Nat'l Bank v. *Luckett*, 321 U.S. 233 (1944) 15

Page

Bank of New Orleans & Trust Co. v. *Saxon*, 211 F. Supp. 576 (D.D.C. 1962) 5

Braeburn Securities Corp. v. *Smith*, 15 Ill. 2d 55, 153 N.E. 2d 806 (1958), appeal dismissed *per curiam* for want of a substantial federal question, 359 U.S. 311 (1959) 9, 46, 48

Brooks-Scanlon Co. v. *Railroad Comm'n of Louisiana*, 144 La. 1086, 81 So. 727 (1919) 27

Brown v. *Benton Creosoting Co.*, 147 So.2d 89 (La. App. 1963) 28

Camden Trust Co. v. *Gidney*, 112 U.S. App. D.C. 197, 301 F.2d 521 (1962), *cert. denied*, 369 U.S. 886 33

Chase Securities Corp. v. *Husband*, 302 U.S. 660 (1938) 15

Commercial State Bank of Roseville v. *Gidney*, 174 F. Supp. 770 (D.D.C. 1959), *aff'd per curiam*, 108 U.S. App. D.C. 37, 278 F.2d 871 (1960) 10, 15, 24, 50

Deitrick v. *Greaney*, 309 U.S. 190 (1940) 16

Federal Deposit Ins. Corp. v. *Tremaine*, 133 F.2d 827 (2d Cir. 1943) 15

First Nat'l Bank in Billings v. *First Bank Stock Corp.*, 306 F.2d 937 (9th Cir. 1962) 31, 36

First Nat'l Bank in St. Louis v. *Missouri*, 263 U.S. 640 (1924) 15, 17

Lewis v. *Fidelity & Deposit Co.*, 292 U.S. 559 (1934) 7, 13, 14, 15

McClellan v. *Chipman*, 164 U.S. 347 (1896) 15

M'Culloch v. *Maryland*, 4 Wheat. 316 (1819) 11

Meraux v. *R. R. Barrow, Inc.*, 219 La. 309, 52 So. 2d 863 (1951) 27

Milheim v. *Moffat Tunnel Improvement Dist.*, 262 U.S. 710 (1923) 46

National Bank of Detroit v. *Wayne Oakland Bank*, 252 F.2d 537 (6th Cir. 1958), *cert. denied*, 358 U.S. 830 ..... 10, 14, 16, 24, 50

Opinion of the Justices, 102 N.H. 106, 151 A.2d 236 (N.H. Sup. Ct. 1959) 47, 48

Page

Rushton ex rel. State Banking Comm'r v. *Michigan Nat'l Bank*, 298 Mich. 417, 299 N.W. 129 (1941) 16

South Dakota v. *National Bank of South Dakota*, 219 F. Supp. 842 (S.D.S.D. 1963), *aff'd* No. 17,460, (8th Cir., Aug. 10, 1964) 15

South Dakota v. *National Bank of South Dakota*, No. 17,460, (8th Cir., Aug. 10, 1964) 36

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Whitney Holding Corp., Application of, 1962 Fed. Res. Bull. 560 26

Whitney Nat'l Bank in Jefferson Parish v. *Bank of New Orleans & Trust Co.*, 116 U.S. App. D.C. 285, 323 F.2d 290 (1963), *cert. granted*, 376 U.S. 948 (1964) 4

CONSTITUTIONS, STATUTES AND RULES:

U. S. Const., art. VI, cl. 2 45

Banking Act of 1933 (Act of June 16, 1933, c. 89):
48 Stat. 189 (1933), 12 U.S.C. § 36(c) (1958) 37

Bank Holding Company Act of 1956 (Pub. L. 511, 84th Cong. 2d Sess., Act of May, 9, 1956, c. 240)
70 Stat. 133 (1956, 12 U.S.C. § 1841(b) (1958) 42
70 Stat. 133 (1956), 12 U.S.C. § 1841(c) (1958) 42
70 Stat. 134 (1956), 12 U.S.C. § 1841(d) (1958) 42
70 Stat. 135 (1956), 12 U.S.C. § 1842(d) (1958) 44
70 Stat. 135 (1956), 12 U.S.C. § 1843 36
70 Stat. 138 (1956), 12 U.S.C. § 1846 (1958) 5, 6, 15, 41

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Illinois Bank Holding Company Act of 1957, Ill. Rev. Stats., C. 16-1/2, §§ 71-76 (1961) 46

Page

Louisiana Law 275 of 1962, West's La. Rev. Stat. Anno., tit. 6, c. 12, § 1003(5) (1962 Supp.) 5, 8, 9, 28, 40, 41, 45, 48, 49, 50
La. R. S. § § 6:54, 55 (1951) 3, 28
McFadden Act of 1927 (Act of February 25, 1927):
44 Stat. 1228-29 (1927) as amended 12 U.S.C. § 36(c) (1963 Supp.) 19, 25
44 Stat. 1229 (1927), 12 U.S.C. § 321 (1958) .. 19
National Bank Act (Act of February 25, 1863):
44 Stat. 223-24 (1926), 12 U.S.C. § 548 (1958) 15
44 Stat. 1224-25 (1927), 12 U.S.C. § 371 (1958) 14
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48 Stat. 185 (1933), 12 U.S.C. § 51 (1958) 14
48 Stat. 191 (1933), as amended, 12 U.S.C. § 85 (1958) 14
64 Stat. 456 (1950), 12 U.S.C. § 214c (1958) .. 14
76 Stat. 668 (1962), 12 U.S.C.A. § 92a(a) (1963 Supp.) 14
National Bank Act of 1864, Rev. Stat. §§ 5133 *et seq.* (1875), as amended, 13 Stat. 99 (1875), as amended, 12 U.S.C. §§ 21 *et seq.* (Supp. III 1961) 2
Supreme Court Rule 42 2

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65 Cong. Rec. 11298 (1924) 19
75 Cong. Rec. 9890, 9971 (1932) 22
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1997 ..... 23, 24
2079 24
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Page

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H.R. 2, 69th Cong., 1st Sess. (1926) 19
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H.R. Rep. No. 583, 68th Cong., 1st Sess. 1924) 18
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MISCELLANEOUS:

Page

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BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF SUPERVISORS OF STATE BANKS

INTRODUCTION

This Brief of Amicus Curiae is filed pursuant to Rule 42 of this Court with the consent of all parties to this case.

The National Association of Supervisors of State Banks (hereinafter called the "Supervisors") was founded in 1902 and has 52 members. It is composed of the officials of State governments responsible for the supervision of State-chartered banking institutions in every State in the Union and of such officials in the Commonwealth of Puerto Rico and in the Virgin Islands. As of December 31, 1963, there were 9,477 commercial and mutual savings banks chartered under State laws subject to the Supervisors' jurisdiction with total resources in excess of 193 billion dollars.[1]

The present system of federally chartered, or National banks, was created by the National Bank Act of June 3, 1864, c. 106, 13 Stat. 99 (1875), 12 U.S.C. §§21 *et seq.* The Comptroller of the Currency, an office presently held by Petitioner Saxon, is authorized to charter and supervise National banks under the provisions of that Act. As of December 31, 1963, there were 4,615 National banks with total resources in excess of 170 billion dollars.[2]

State banks, under State charters, and National banks, under federal charter, together comprise the "dual banking system" of the United States which has been in existence for 100 years.

The Supervisors have a keen interest in the resolution of the two issues on the merits presented by this case:

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[1] Federal Deposit Insurance Corporation, *Annual Report* (1963), p. 116; Federal Deposit Insurance Corporation, "Report of Call No. 66, Assets, Liabilities and Capital Accounts, Commercial & Mutual Savings Banking" (Dec. 20, 1963), p. 3.

[2] *Idem.*

Branch banking restrictions. The statutes of the 50 States relating to branches of State banks vary widely. (See Appendix A to this brief). They reflect the particular needs of each State relative to their differing economies, as well as divergent philosophies on the degree of protection which should be afforded small unit banks throughout the State from branches of large city banks. Thus some sixteen States prohibit all branching. Eleven other states permit unlimited statewide branching. The remaining twenty-three States permit branches with widely varying restrictions, primarily related to geography[1] and numbers of banking offices,[2] in an effort to tailor branching requirements to the varying economic conditions within the State itself. Louisiana is an example of this latter category.[3] It prohibits, as a practical matter, all banks from branching across parish lines.[4] Thus, the banks of New Orleans (co-terminus with Orleans Parish, and comprising the largest city and the heaviest banking concentration in the State), are prohibited from branching anywhere else in the State.[5]

The existence of such a multiplicity of varying State branch laws creates a very practical problem. It is obvious that without competitive equality in such an im-

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[1] Branches may be confined (a) to the city and/or county of the head office and/or contiguous counties; (b) to a specified mileage radius of the head office; or (c) to any of the foregoing dependent upon a minimum population or population range.

[2] The usual provision is that no branch may be established in a designated area where there is already a main office or branch of a State or National bank in operation.

[3] La. R.S. §§ 6:54, 55 (1951).

[4] The statute provides, with certain exceptions not here applicable, that a bank with capital of over $100,000 may establish a single branch in each parish, other than its home parish, having no State banks. There are today, however, no parishes without State banks.

[5] La. R.S. §§ 6:54, 55 (1951).

portant area as the right to branch between State and National banks operating side by side in each State, the dual banking system could not long survive. The class of banks suffering from the competitive disadvantage would quickly convert to the other system. In recognition of this fact, Congress has established a policy of equalization between State and National banks in the matter of branching by prescribing State law as the standard for the establishment of branches by National banks under Section 36(c) of the National Bank Act, 44 Stat. 1228-1229 (1927), as amended, 12 U.S.C. § 36(c) (1963 Supp.).

The Supervisors are therefore deeply concerned with any development the net effect of which would be to give a National bank the right to establish an additional banking office prohibited to a competitor State bank contrary to the established policy of equalization. The transaction here involved would do just that. It was entered into for the admitted purpose of circumventing Louisiana branch law, and the Attorney General of Louisiana has ruled that such a transaction, undertaken by a similarly situated State bank, would be declared an unlawful evasion of Louisiana branch law. (R. 164). Accordingly, the Supervisors urge affirmance of the decision below on the grounds stated in the decision of the United States Court of Appeals for the District of Columbia Circuit (Miller, J.), which is reported at 116 U.S.App.D.C. 285, 323 F.2d 290, and appears at R.454-477. That Court held that when the corporate veil of the intricate transaction here involved was pierced, Petitioner Whitney National Bank in Jefferson Parish (Whitney-Jefferson) emerges not as a new bank, but as a forbidden branch of the Whitney National Bank of New Orleans (Whitney-New Orleans). The court thus struck down a transaction which would have otherwise provided a vehicle, not only in Louisiana but in any of the other thirty-eight states which prohibit or restrict branching, and which bar the Whitney-New Orleans approach as an unlawful evasion of State branch

law, to negate the policy of equalization in branching which Congress sought to achieve in Section 36(c) of the National Bank Act. The continued vitality of the dual banking system requires the maintenance of this policy of equalization.

Bank holding company restrictions: Nineteen states prohibit or restrict bank holding companies in some manner. (See Appendix B to this brief) Accordingly, any holding of this Court that Louisiana Law 275 of 1962,[1] does not prohibit the expansion of a bank holding company organized under Louisiana statutes from opening for business a new National bank subsidiary, or that the law is unconstitutional with such an intention, may affect the validity of other State statutes seeking to prohibit or restrict the expansion of bank holding companies.

Accordingly, the Supervisors alternatively urge affirmance of the decision below on the grounds stated in the decision of the District Court for the District of Columbia (McLaughlin, J.) which is reported at 211 F.Supp 576, *sub nom Bank of New Orleans & Trust Co.* v. *Saxon*, and at R. 435-438. That court held that Louisiana Law 275 of 1962 constituted a bar to the opening for business by Whitney-Jefferson, a subsidiary of the newly organized Whitney Holding Corporation, whose stock was owned by the former stockholders of Whitney-New Orleans, the other subsidiary of Whitney-Holding. It also held that Louisiana Law 275 was validly enacted within the scope of Section 7 of the Federal Bank Holding Company Act of 1956, 70 Stat. 138 (1956), 12 U.S.C. § 1846 (1958), reserving to the States such powers and jurisdiction as they then had, or might exercise in the future, with respect to banks and bank holding companies, and that Louisiana Law 275 was therefore constitutional in its application to National banks.

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[1] West's La. Rev. Stat. Anno., tit. 6, c. 12, § 1003(5) (1962 Supp.).

QUESTIONS PRESENTED

1. Whether the Comptroller of the Currency is barred from issuing a certificate of Authority to a proposed National bank by reason of Section 36(c) of the National Bank Act establishing State law as the standard by which branches of National banks may be established, when the transaction here involved would be prohibited to a similarly situated State bank under State branch law.

2. Whether the Comptroller of the Currency is barred from issuing a Certificate of Authority to a proposed National bank by reason of a State law restricting the growth of bank holding company systems which was enacted within the scope of the powers and jurisdiction reserved to the States by Section 7 of the Bank Holding Company Act of 1956?

STATUTES INVOLVED AND STATEMENT OF THE CASE

The facts of this case are as set forth in the opinions of the courts below (R. 445-448 and 455-458, 470-476), and in the counter-statement of facts in Respondents' briefs.

The principal statutes involved are set forth in Appendix A to the briefs filed in this court by Petitioner Saxon and Petitioner Whitney-Jefferson.

SUMMARY OF ARGUMENT

I

The question of whether a specific State law is applicable to National banks is not to be answered by reference to the broad and admitted generality that National banks are instrumentalities of the Federal Government and are subject to the paramount authority of the United

States. The answer rather, lies in a search for Congressional intent of the extent to which Congress intended State law to be applicable to National banks.

A reading of the National Bank Act, and related federal banking statutes, demonstrates that Congress intended to give a very special significance to the applicability of State law to the National banks which it created. It did so for a very practical reason. State and National banks operate side by side in each State and it is obvious that neither class of banks could long survive if one had substantial competitive privileges denied to the other. Accordingly, Congress adopted the "policy of equalization" in the National Bank Act. *Lewis* v. *Fidelity & Deposit Co.*, 292 U.S. 559 (1934). It did so (1) by specifically adopting State law in a number of instances as the standard for National banks; and (2) by declining to occupy the field so as to preclude the application of State laws to National banks which do not conflict with Federal law. *Idem.*

No where has this "policy of equalization" been more forcefully applied than in the matter of branching. A reading of the great debates preceding the branch banking provisions enacted into Section 36(c) of the National Bank Act by the McFadden Act of 1927 and the Banking Act of 1933 leaves the impression of a positive, unequivocal and dominant expression of Congressional intent to insure competitive equality between National and State banks in the matter of branching by the adoption of State branch law as the standard for the establishment of branches of National banks. The transaction here involved is a manifest violation of that "policy of equalization". The net result, if approved, would be to permit a National bank to acquire a banking office at a forbidden branch location which is not available to competitor State banks. Certainly, as this Court has said, "if the judicial power is helpless to protect a legislative program from

schemes for easy avoidance, then indeed it has become a handy implement of high finance." *Anderson* v. *Abbott*, 321 U.S. 349, 366-7 (1944). Accordingly, this Court should pierce the corporate veil of the intricate Whitney-New Orleans transaction and declare Whitney-Jefferson to be a forbidden branch. *Idem.*

Petitioners err in contending that the Whitney-New Orleans transaction somehow fits within the mainstream of the group banking tradition in this country which has been treated by Congress apart from branching. There is a vast difference between the typical bank holding company organized for investment purposes, and the transaction here involved of one bank setting out to capitalize a holding company, and through it, an affiliate in an adjoining parish, all for the purpose of avoiding State branching law. Clearly, if Congress had really intended by the Bank Holding Company act of 1956, or elsewhere, to give a "green light" to the Whitney-New Orleans transaction as a device to avoid the statutes of the thirty-nine states which prohibit or limit branch banking, there obviously would be today far more than just fifty-two holding companies registered under the Act in the entire country.

II.

The Whitney-New Orleans transaction is also prohibited by Section 3(5) of Louisiana Law 275 of 1962 which prohibits any subsidiary of a bank holding company not now opened for business from doing so. This provision is part of a statute reflecting a policy of Louisiana to prohibit all bank holding company systems within the borders of the State.

Again, there is no point in debating the constitutionality of this statute within the framework of the admitted proposition that National banks are instrumentalities of the Federal Government. The question is

whether Congress intended to permit States to be more restrictive in their regulation of bank holding companies than is contained in the Bank Holding Company Act of 1956.

This is precisely what Congress did in Section 7 of the Bank Holding Company Act of 1956, when it reserved to the States such powers and jurisdiction as they then had, or might exercise in the future, with respect to banks and bank holding companies. At that time, Congress was aware that a number of States had laws which purported to prohibit or restrict bank holding companies, some of which laws were applicable to National banks. (Appendix C and D.) There is, therefore, no doubt that States have the right to restrict or prohibit the growth of bank holding companies, which statutes are applicable to National banks. The appeal of the decision in *Braeburn Securities Corp.* v. *Smith*, 15 Ill. 2d 55, 153 N. E. 806 (Ill. Sup. Ct. 1958), so holding was dismissed by this Court *per curiam* for want of a substantial federal question. 359 U.S. 311 (1959).

Petitioners seek to escape the inexorable logic of the foregoing by pinpointing Section 3(5) of Louisiana Law 275, applicable to this case, which they correctly note is not specifically to be found in other State statutes restricting bank holding companies. Their argument appears to be that, assuming the Section 7 reservation of power validly embraces a State statute prohibiting a bank holding company from acquiring the stock of a National bank subsidiary, it does not embrace an additional effort to restrict bank holding company expansion through a provision, such as Section 3(5) of Louisiana Law 275, prohibiting a bank holding company from opening for business any National bank subsidiary which has not yet opened for business. This is a strained distinction without legal significance. If, under the Section 7 reservation of power, Congress intended to permit a State to prohibit

a bank holding company from acquiring stock in a proposed new National bank subsidiary, it certainly intended to permit a State to prohibit a bank holding company from opening for business any new National bank subsidiary, the stock of which has just been acquired. There is absolutely nothing in the legislative history of the Bank Holding Company Act of 1956 indicating that such a National bank subsidiary should have some sort of special exemption from the general policy of Section 7. It is still in an embryonic stage until the issuance of a certificate of authority by the Comptroller. Only with the issuance of such a certificate could it become, for the first time, a lawful bank authorized to do business.[1] It is the validity of the issuance of such a certificate which is at issue in this case.

ARGUMENT

I. The issuance of a certificate of authority to Whitney-Jefferson would constitute an unlawful evasion of the provisions of Section 36(c) of the National Bank Act.

A. *In the National Bank Act Congress has adopted a "policy of equalization" between National and State banks.*

The *Amicus Curiae* does not contest the proposition advanced with great vigor from time to time in Petitioners' briefs to the effect that National banks are instrumentalities of the Federal Government and are subject to the paramount authority of the United States. That issue has long since been resolved in the great constitutional debates which surrounded the creation of the

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[1] *Cf., Commercial State Bank of Roseville* v. *Gidney*, 174 F.Supp. 770 (D.D.C. 1959), *aff'd per curiam*, 108 U.S. App. D.C. 37, 278 F.2d 871 (1960), citing *National Bank of Detroit* v. *Wayne Oakland Bank*, 252 F.2d 537 (6th Cir. 1958) *cert. denied*, 358 U.S. 830.

First (1791-1811) and Second (1816-1832) banks of the United States holding charters from Congress.[1] Although many persons, including Jefferson, who opposed the creation of the First Bank, and Jackson, who vetoed the charter of the Second Bank, felt that Congress had no Constitutional authority whatever to charter banks, Chief Justice John Marshall set the matter to rest in his opinion in *M'Culloch* v. *Maryland*, 4 Wheat. 316 (1819). While recognizing that "it does not appear that a bank was in the contemplation of the framers of the Constitution", he enunciated the doctrine of implied powers and held that a bank could be chartered by Congress as a financial agent of the Federal Government to assist in the implementation of the Federal Government's fiscal powers which were specifically granted to Congress by the Constitution. The question of the paramount authority of Congress over National banks has, therefore, long since been settled.

In line with the foregoing, the *Amicus Curiae* is obviously aware that Congress has the power, *if* it wished to utilize such power, to bar the applicability of State law to the operations of National banks. The question, however, which forms the pivotal background for the issues in this case, is the *extent* to which Congress elected to permit the applicability of State law to National banks, and, indeed, the extent to which it intended to *adopt* State law as the standard for banking operations of National banks.

The creation of the dual banking system by the addition of a system of National banks under federal charter operating side by side in each State with State banks

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[1] See, e.g., Conant, *A History of Modern Banks of Issue* (G. A. Putnam's Sons, New York and London, 1915); Kane, *The Romance and Tragedy of Banking* (The Bankers Publishing Co., N.Y., 1923); Prochnow, *American Financial Institutions* (Prentice Hall, 1961).

under State charter required Congress to *affirmatively* decide this question.[1]

The necessity for such affirmative action arose because of the fact that National and State banks are competitors for depositors in each State. It is elementary economics that although State statutes, governing State banks, and the National Bank Act, governing National banks, can (and do) vary in many significant areas, the survival of one or the other class of banks in any State must rest upon an equality in certain basic competitive areas. If one or the other class of banks in a particular State have far more liberal rights and privileges than the other in such important areas as the right to branch, to perform trust functions, to pay interest on deposits, or charge interest on loans, etc., the underprivileged banks would quickly convert to the other system leaving the dual banking system an empty shell. For example, if Congress should authorize all National banks to open branches in the city in which their home office is located, but not elsewhere in the State, such National banks would be placed at an immediate competitive disadvantage with State banks in States which permit statewide branch banking. Similarly, such National banks would be granted an immediate competitive advantage over State

[1] It did not do so immediately because the "birth" date of the dual banking system, as we know it today, must realistically be placed some time later than the passage of the National Bank Act. In 1865, Congress placed a prohibitive tax on State bank notes, then the principal source of State bank income, with the avowed purpose of putting State banks out of business. As a result the number of State banks declined drastically and the survival of the State banking system was largely accredited to the growth and profitability of deposit banking. See sources cited in note 1, p. *11 supra*. By 1892, however, almost 30 years after the prohibitive bank note tax, the number of State banks overtook the number of National banks and the dual banking system may by then be considered as having been firmly established. Board of Governors of the Federal Reserve System, "Banking Studies" (1941), pp. 15, 418.

banks in States which prohibit all branching, requiring the legislatures of these States to mobilize into immediate action to amend their statutes to meet the provisions of the National Bank Act, regardless of whether the State legislatures were of the opinion that economic conditions warranted granting State banks the right to branch.

Congress solved the foregoing problem in a very practical way:

First, it decided upon a "policy of equalization" between National and State banks by *adopting* State law as the standard for National banks in most of the important competitive areas. *Lewis* v. *Fidelity & Deposit Co.*, 292 U. S. 559 (1934). In that case the question was whether a 1930 amendment to the National Bank Act authorizing a National bank to "give security" for State deposits meant merely a pledge of specific assets or a general lien upon the bank's assets. State banks, competitors of National banks for such deposits, had the right to give the more impressive security of a general lien. This Court ruled in favor of the general lien on the basis of the "policy of equalization" which it held Congress had adopted in the National Bank Act. At 292 U.S. 559, 564-565, Mr. Justice Brandeis, writing for the Court, said:

> "For the main purpose of the 1930 Act was to equalize the position of national and state banks; and without such power national banks would not in Georgia be upon an equality with state banks in competing for deposits. The *policy of equalization* was adopted in the National Bank Act of 1864, and has ever since been applied, in the provision concerning taxation.[2] In amendments to that Act and in the Federal Reserve Act and amendments thereto the policy is expressed in provisions conferring power to establish branches;[3] in those conferring power to act as fiduciary;[4] in those concerning interest on deposits;[5] and in those concerning capitalization.[6]" (Footnotes omitted) (Emphasis supplied)

Thus, some of the more important instances of the specific adoption of State law in the National Bank Act are as follows: (a) *Branches.* Section 36(c) adopts State law as the standard for the establishment of branches by national banks. 44 Stat. 1228-29 (1927), as amended, 12 U.S.C. § 36(c) (1963 Supp). (b) *Fiduciary powers.* The Comptroller may grant a permit to National banks, "when not in contravention of State or local law", to "act as a trustee . . . or in any other fiduciary capacity in which State banks . . . which come into competition with National banks are permitted to act under the laws of the State in which the National bank is located." 76 Stat. 668, (1962), 12 U.S.C. 92a(a) (1963 Supp), replacing 38 Stat. 26 (1913). (c) *Interest on loans.* National banks may charge interest on loans allowed by the law of the State where the bank is located if such a rate is greater than 1% in excess of the discount rate on ninety-day paper in effect at the local Federal reserve bank. 48 Stat. 191 (1933), as amended, 12 U.S.C. § 85 (1958). (d) *Interest on time and savings deposits.* National banks may not pay a greater rate of interest than the maximum rate authorized by law upon such deposits by banks organized under the laws of the State in which the National bank is located. 44 Stat. 1224-25, 12 U.S.C. § 371. (e) *Capitalization.* In certain instances State law is the measure of allowable capitalization of new National banks. 48 Stat. 185 (1933), 12 U.S.C. § 51 (1958). (f) *Merger and conversion.* No conversion of a National bank to State bank, or its merger with a State bank, may take place in "contravention of the law of the State in which the National banking association is located." 64 Stat. 456 (1950), 12 U.S.C. 214c (1958).[1]

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[1] For cases, other than *Lewis* v. *Fidelity & Deposit Corp.*, *supra*, holding that in one or more of the above categories Congress *specifically* intended to establish competitive equality between National and State banks by the adoption of State law as the standard for National banks, see, *National Bank of Detroit* v. *Wayne*

Secondly, in addition to specifically applying State law to National banks in many instances, Congress did not seek to occupy the field so as to preclude the application of State laws to National banks which do not conflict with Federal law. Sometimes it made a specific reservation of power, as for example, the reservation to the State of broad areas of taxation of National banks, 44 Stat. 223-24 (1926), 12 U.S.C. § 548 (1958), and the reservation of powers over bank holding companies, and bank subsidiaries in the Bank Holding Company Act of 1956, 70 Stat. 138 (1956), 12 U.S.C. § 1846 (1958), which will be discussed at length in the second section of this brief. The courts have also enunciated this general principal on a number of occasions. Thus in *First Nat'l Bank in St. Louis* v. *Missouri*, 263 U.S. 640 (1924), this Court held—at a time prior to the passage of Section 36(c) of the National Bank Act—that a Missouri statute forbidding branch banks was applicable to National banks. Similarly, in *Lewis* v. *Fidelity & Deposit Co.*, a portion of which opinion is quoted above illustrating the "policy of equalization", this Court upheld the applicability of provisions of Georgia law relating to duties of a depository. 229 U. S. 559, 565-6.[1]

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It is thus very important to note at the outset of a consideration of the issues in this case that Congress has given a *special* significance to the applicability of State law to the National banks which it has created. It has

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Oakland Bank, 252 F.2d 537 (6th Cir. 1958), *cert. denied*, 358 U.S. 830; *Federal Deposit Ins. Corp.* v. *Tremaine*, 133 F.2d 827 (2nd Cir. 1943); *South Dakota* v. *National Bank of South Dakota*, 219 F.Supp. 842 (S.D.S.D. 1963) aff'd No. 17,460 (8th Cir. Aug. 10 1964); *Commercial State Bank of Roseville* v. *Gidney*, 174 F.Supp. 770 (D.D.C. 1959), *aff'd per curiam* 108 U.S. App. D.C. 37, 278 F.2d 871 (D.C. Cir. 1960).

[1] See, also *Anderson Nat'l Bank* v. *Luckett*, 321 U.S. 233 (1944); *Chase Securities Corp.* v. *Husband*, 302 U.S. 660 (1938); *McClellan* v. *Chipman*, 164 U.S. 347 (1896).

intended an applicability of such law in many of the most important and vital areas of banking. It did so because only by a "policy of equalization" in basic competitive areas can the dual banking system, as a practical matter, survive.[1]

B. *Nowhere has the Congressional "policy of equalization" been more forcefully expressed in the National Bank Act than in Section 36(c) wherein Congress required the Comptroller to follow State law as the standard for the establishment of branches of National banks.*

A review of the history of Section 36(c) of the National Bank Act relating to branches will demonstrate the positive expression of Congressional intent to insure

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[1] The "policy of equalization" is entirely consistent with the oft-quoted proposition in Petitioners' briefs that the National Bank Act "constitutes 'by itself a complete system for the establishment and government of National Banks.'" *Deitrick* v. *Greaney*, 309 U.S. 190, 194 (1940). As noted above, the "policy of equalization" was *incorporated* by Congress into that system by the adoption of certain nondiscretionary State laws to be applied by the Comptroller in his regulation of National banks, and by provision for the applicability to National banks of State laws which do not conflict with the pattern established in the Act. Congress went no further, and certainly did not, for example, jeopardize the independence of the National banking system, and hence the "duality" of the dual banking system, by subjecting any decision of the Comptroller to a review or approval by a State Supervisor. *Rushton ex. rel State Banking Comm'r.* v. *Michigan Nat'l Bank*, 298 Mich. 417, 299 N.W. 129 (1941). The very concept of the dual banking system embraces an independence of action on the part of both the Comptroller and the Supervisors in the establishment of National and State banks, although "cooperation" between the two "appears to have been intended by Congress. . . ." *National Bank of Detroit* v. *Wayne Oakland Bank*, 252 F.2d 537, 543 (6th Cir. 1958), *cert. denied*, 358 U.S. 830. However, the independence of the Comptroller within the pattern of the National Bank Act does *not* embrace a complete independence of State laws. Congress, in its "policy of equalization" reflected in the Act, has demonstrated a clear intent that national banks be subject to such State laws in many of the most important areas of banking.

equality between National and State banks in the matter of branching. This point will have an obvious bearing on a determination of the question, considered later in the brief, of whether Congress *really* contemplated an avoidance of State branch law through the transaction employed by Whitney-New Orleans in this case.

Prior to 1927. Between 1864 and 1927, the National Bank Act did not provide for the establishment of branches by National banks. This Court had made it clear that, except in the case of certain limited and specifically stated exceptions by Congress, National banks had no branch authority whatever. *First Nat'l. Bank of St Louis* v. *Missouri*, 263 U.S. 640 (1924). The law of many States, on the other hand, permitted State-chartered banks to establish branches.

Prior to the turn of the century, this situation created no problem. At that time there only were 87 banks (82 State and 5 National) operating a total of 119 branches, most of which were outside of the head office city. By the end of 1923, however, there were 671 banks (580 State and 91 National) operating 2,054 branches, most of which were in the head office city.[1] In his Annual Report for 1923, the Comptroller of the Currency, after discussing this matter said (p. 6):

> "If, however, state member banks engage in unlimited branch banking, it will mean the eventual destruction of the national banking system. . . ."

And in his 1924 Report, he said (p. 4):

> "The question as to whether national banks may be granted the opportunity to meet the competition of state banks in intra-city banking in my opinion involves the question of the perpetuation of the national banking system."

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[1] "Banking Studies", note 1, p. 12 *supra*, at p. 428.

By this time, Congress had become aware of the problem. The House Banking and Currency Committee held hearings in April of 1924 at which the Comptroller of the Currency reiterated his warning.[1] The House Committee then reported out a bill, the purpose of which was to equalize National and State bank branching opportunities by granting National banks the right to establish branches in their home-office towns, and by limiting branching by State bank members of the Federal Reserve System (then, as now, the largest of the State banks) to such in-town branches.[2] The House Report said:

> "The bill recognizes the absolute necessity of taking legislative action with reference to the branch banking controversy. The present situation is intolerable to the national banking system. The bill proposes the only practicable solution by stopping the further extension of State-wide branch banking in the Federal reserve system by State member banks and by permitting national banks to have branches in those cities where State banks are allowed to have them under State laws." [3]

And when the bill reached the floor, Representative McFadden, its sponsor, said:

> "I may say here that this permission for national banks to meet the competition of State banks engaged in branch banking in certain large cities is absolutely vital to the maintenance of the National banking system. It is an economic fact easily demonstrated by reference to recent banking history that the national banks in those cities where the State banks are engaged in branch banking will

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[1] Hearings before House Committee on Banking & Currency on H.R. 6855, 68th Cong., 1st Sess. (1924), pp. 17, 30, 34.

[2] H.R. Rep. No. 583, on H.R. 8887, House Banking and Currency Committee, 68th Cong., 1st Sess. (1924) Secs. 8 and 9.

[3] *Idem.* at p. 5.

> gradually die out for want of the power to meet their competitors on equal terms unless this provision of the bill is enacted into law." [1]

This bill passed the House.[2] However, although a similar bill was recommended favorably by the Senate Banking and Currency Committee,[3] it failed of passage prior to the expiration of the 68th Congress.[4]

McFadden Act of 1927. The bill which ultimately became the McFadden Act of 1927 passed during the 69th Congress. Competitive equality was achieved granting National banks the right to have intra-city branches

> "if such establishment and operation are at the time permitted to State banks by the law of the State in question"

and, at the same time, limiting State banks, members of the Federal Reserve System to intra-city branching. 44 Stat. 1228 (1927), as amended 12 U.S.C. 36(c) (1963 Supp.); 44 Stat. 1229 (1927), 12 U.S.C. 321 (1958).

One important additional indication of the mood of Congress in making it clear that the question of the desirability of branches was a matter strictly up to the *States* to decide, emerged from the Senate rejection of the so-called "Hull amendments" to the House bill in the 69th Congress. The House bill (H.R. 2) had originally proposed that National banks might only establish in-town branches in States where State law permitted in-town branches at the time of the enactment of the bill. No right was given to such National banks if, at a later time, State law permitted State banks to establish in-

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[1] 65 Cong. Rec. 11298 (1924).

[2] See H.R. Rep. No. 83, 69th Cong., 1st Sess. p. 2 (1926).

[3] S. Rep. No. 666 on S. 3316, Senate Banking and Currency Committee, 68th Cong., 1st Sess. (1924).

[4] Note 2, *supra*.

town branches.[1] The Senate Banking and Currency Committee, however, struck that provision on the grounds that it constituted an unwarranted "pressure" by Congress on State legislatures to decline to expand branch authority, and that the matter of branching privileges was a matter for the *States* to decide.[2] The Senate position was upheld in conference and ultimately enacted into law.[3]

Banking Act of 1933. During the depression, a fundamental challenge to the principle of competitive equality in branching occurred. Many persons felt that many bank failures during the Bank Holiday were due to the fact that small rural banks were not strong enough to weather economic adversity, and that these locations could best be served by branches of larger and stronger banks. Their view was that branch banking should be authorized for national banks *regardless* of state branch law in order to meet what was considered to be a crisis in banking.[4]

This view was stated by the dominant banking figure of the times, Senator Carter Glass of Virginia. Accordingly, in 1932, the Senate Banking and Currency Committee reported out a bill, S. 4412, to expand the authority of a National bank to establish branches granted in the McFadden Act of 1927 beyond just the municipality in which its main office was located, *irrespective* of State law. The Senate Report, in its Section under "Insolvency of Banks", said:

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[1] Note 2, p. 19 *supra*, at pp. 2, 4.

[2] S. Rep. No. 473, 69th Cong., 1st Sess. (1926), pp. 9-10.

[3] H. R. Rep. No. 1481, 69th Cong., 1st Sess. (1926), p. 6.

[4] See, *e.g.*, testimony of Comptroller of the Currency, J. W. Pole during the 1931 hearings before the Subcommittee of the Senate Banking and Currency Committee. Hearings before Subcom. of Sen. Com. on Banking & Currency, pursuant to S. Res. 71, 84th Cong., 1st Sess. (1955) pp. 7-19.

". . . provision for branch-banking powers under carefully qualified conditions with a view to making a larger experiment with branch banking is deemed essential and due provision for it is made. Specifically, what is proposed is the grant of power to establish branches of national banks not merely in the towns and cities in which they are located but also outside of such limits at any point within the borders of the State in which they exist, irrespective of State laws."[1]

This proposal met with vigorous opposition. It was obvious that if National banks were granted a competitive advantage over State banks in the matter of branching, State banks would convert to National banks and the State banking system would be destroyed, unless the State legislatures in all of the nonbranch or limited-branch states moved immediately to conform their statutes to this unrestricted branch proposal—the reverse effect of the situation in 1922-27 when the Comptroller argued that unless National banks were given the right to branch in competition with State banks, the National banking system would be destroyed. Thus, Senator Norbeck, writing for the Minority of the Senate Committee ". . . in protest against the proposed extension of the branch banking. . . ." said:

"In speaking of our banking system, we must keep in mind that we have: (1) A system of national banks chartered and supervised by the Federal Government. (2) We have a competitive system, that of State banks, chartered and supervised by the States.

There is difference of opinion among well-informed people as to their comparative merits, and certainly there is a great desire on the part of certain people to wipe out the State banking system. What can not be done directly by law may be done by giving the

[1] S. Rep. No. 584, 72nd Cong., 1st Sess., p. 11 (1932).

> national system such an advantage that the competitive State system can not exist." [1]

The debate continued on the floor of the Senate. 75 Cong. Rec. 9890 *et seq.* Senator Glass pressed the need for Statewide branching regardless of State law in order that larger banks could take over smaller banks and convert them into branches. 75 Cong. Rec. 9974 (1932). Senator Norbeck led the opposition proposing an amendment

> ". . . to strike out section 19 of the bill, which permits an enlargement of the branch-banking privileges.
>
> I do that mainly because I believe in the American system of banking. We have a dual system. We have two systems. We have one controlled by the States, we have another one controlled by the Federal Government. The two have grown up side by side. I think they have rendered splendid service, and I think we should be ever jealous of anything that will tend to destroy one system for the benefit of the other." 75 Cong. Rec. 9974 (1932).

And later he said:

> "It is a bill to establish a new system of banking all over the United States, to do away with the dual system of banking, and to substitute a single system of banking, which I feel will be under too much central control." 75 Cong. Rec. 13002 (1932).

A compromise position was finally taken between Senator Glass' unlimited branch expansion position and Senator Norbeck's resistence to any branch expansion. The bill was finally passed after an amendment was adopted on the floor of the Senate whereby National banks could establish out of town branches if such branches could be

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[1] S. Rep. No. 584, 72nd Cong., 1st Sess. (1932) Pt. II (Minority Views), p. 1.

established by State banks by the law of the State in question, thus restoring the principle of competitive equality. This amendment was known as the Bratton amendment, and, as it finally emerged, was itself amended by amendments of Senators Wheeler and Blaine.

Senator Bratton of New Mexico said:

> "I think the proposed bill goes too far. It seems to me that the question of whether branch banking shall be permitted in a given State should be determined by that State. . . . We are asked to permit national banks, in disregard of State laws, overriding the sentiment of a State, to engage in branch banking whether it is desired in the State or not." 76 Cong. Rec. 1449 (1933).

Accordingly, he proposed an amendment which read as follows:

> "A national banking association may establish and operate new branches within the limits of the city, town, or village, or at any point within the State in which said association is situated, if such establishment and operation are at the time permitted to State banks by the law of the State in question." 76 Cong. Rec. 1997 (1933).

Senator Wheeler of Montana supported Senator Bratton. He said

> ". . . I do not want the United States Government to permit the establishment of branches in States where the people by express statute have forbidden it; or where they have not passed upon the matter, I do not want to permit national banks to go in there and establish branches against the will of the people." *Idem.*

Senator Wheeler also requested that the words "expressly authorized" be substituted for the word "permitted" in the Bratton amendment, which he explained as desirable to handle his concern that a State statute silent

on the matter of branching might be construed as permitting branch banking. 76 Cong. Rec. 1997. Senator Bratton also accepted an amendment offered by Senator Blaine including the language "under restrictions as to location imposed by the law of the State on State banks". 76 Cong. Rec. 2079. As such, the amendment passed the Senate.[1]

The bill failed to pass the House, however, as the 72nd Congress expired. Accordingly, in May of 1933, both the Senate and House Committees on Banking and Currency

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[1] This is the only legislative history on the inclusion of the "location" language in the amendment to the branch provisions of Section 36(c) by the Banking Act of 1933. Although not an issue in this case, the *Amicus Curiae* cannot help but call the attention to this Court to the error in the Petitioners' briefs wherein they continually refer to the restrictions of Section 36(c) as embracing "geographic" limitations in State law as if such limitation are the *only* type of restriction in State law applicable to National banks under Section 36(c) of the National Bank Act. As noted at p. 3 *supra*, there are other restrictions in State law on branching, such as numbers restrictions and banking function limitations. There is no "location" language in the McFadden Act of 1927 (see p. 19, supra) to even suggest a Congressional intent that only geographic limitations in State law should apply to National banks. Further, the unexplained "location" amendment to the Bratton amendment in the Banking Act of 1933 cannot possibly over-come the demonstrable Congressional intent ". . . to have *exactly* the same standards—state law—apply to the establishment of National bank branches as apply to the establishment of State bank branches", *Commercial State Bank of Roseville* v. *Gidney*, 174 F.Supp. 770, 775 (D.D.C. 1959), *aff'd per curiam*, 108 App. D.C. 37, 278 F.2d 871 (D.C. Cir. 1960). (Emphasis in original) Implementation of Congressional intent to achieve competitive equality in branching requires that National banks be bound by *all* nondiscretionary limitations in State branch law under Section 36(c) not just so-called "geographic limitations". Lower courts have applied such nongeographic limitations, such as restrictions on branching in localities where there is already a banking institution present. *National Bank of Detroit* v. *Wayne Oakland Bank*, 252 F.2d 537 (6th Cir. 1958), *cert. denied*, 358 U.S. 830; *Suburban Trust Co.* v. *National Bank of Westfield & Howell*, 222 F.Supp. 259 (D.N.J. 1962), but the Comptroller has apparently declined to accept these decisions outside of the jurisdiction in which they were decided.

favorably reported legislation, S. 1631, and H.R. 5661, which basically contained the Bratton amendment as passed in the prior session. S. Rep. No. 77, 73rd Cong., 1st Sess. on S. 1631, pp. 11, 17 (1933); H.R. Rep. No. 150, 73rd Cong., 1st Sess., on H.R. 5661, p. 4.[1]

* * * *

It was necessary to set out the legislative history of Section 36(c) of the National Bank Act in some detail in order to capture the positive, unequivocal, and dominant expression of Congressional intent to insure equality between National and State banks in the matter of branching. In the McFadden Act of 1927 Congress adopted the "policy of equalization" with regard to in-town branches of National and State member banks, and in the Banking Act of 1933 adopted the "policy of equalization" with regard to out-of-town branches. It is against the background of this forceful expression of Congressional intent that the Whitney-New Orleans transaction must be considered.[2]

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[1] After passage of both the House and Senate, the bill went to Conference. In Conference Committee, the word "statute" was placed before the phrase "law of the state" in the first part of the Bratton amendment. No explanation was given for the insertion of this word. H.R. Rep., 254, 73rd Cong., 1st Sess., p. 29 (1933).

[2] The question of whether Whitney-Jefferson is, in reality, a prohibited branch of Whitney-New Orleans, technically turns upon whether it is a prohibited "out of town" branch under the amendments to Section 36(c) of the Banking Act of 1933. However, the question can only really be answered within the framework of the branch banking *policy* of Section 36(c), embracing both a consideration of the "in town" branch provisions of the McFadden Act of 1927 and the "out of town" branch provisions of the Banking Act of 1933.

C. ***A certificate issued to Whitney-Jefferson would violate the positive, unequivocal and dominant expression of Congressional intent to insure equality between National and State banks in the matter of branching. Accordingly, the corporate veil of the intricate transaction here attempted should be pierced, and Whitney-Jefferson revealed as a forbidden branch of Whitney-New Orleans.***

It is not really necessary at this point to discuss in detail the question of motivation or intent in the Whitney-New Orleans transaction, although it is difficult to read the record below without reaching the conclusion that the whole transaction was entered into *solely* to avoid Louisiana branch banking law.[1]

The question, rather, is the *result* of the transaction. That result is clearly set forth in the opinion of the Federal Reserve Board. *In the Matter of the Application of Whitney Holding Corporation*, dated May 3, 1962 (R. 99). The Board there approved the Whitney Holding Company acquisition of Whitney-Jefferson *as if it were simply a banking office of Whitney-New Orleans in Jefferson Parish.* And, of course, Petitioners can hardly dispute the very basis for approval by the Board upon which they now rely. The Board said:

> "The stated purpose of the proposed holding company system is to enable an organization centered about Whitney New Orleans to provide banking services not only through its existing 12 offices within the City of New Orleans *but also through offices in the East Bank of Jefferson Parish.* The holding company system will be under the direction of the present executive management of Whitney New Orleans; *in fact, for present purposes the holding company iself*

[1] The President of the Whitney National Bank of New Orleans testified before the Federal Reserve Board that "If branch banking were permitted in Jefferson Parish, I wouldn't be here because it would be much simpler to have it by way of a branch." (R. 74).

> *is simply the means by which Whitney banking offices may be established and operated in East Bank.* Consequently, the character of the management and the prospects of the Applicant and its two proposed subsidiary banks may be evaluated largely on the basis of the financial history and condition, character of management, and prospects of Whitney New Orleans." (R. 100-101) (Emphasis supplied)
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> "To the extent that the prospects of Whitney Jefferson depend upon the quality of its management, those prospects also are favorable, since Whitney Jefferson will be subject to general policy direction by Applicant, and Applicant may be expected to provide competent local management for Whitney Jefferson." (R. 101).

Thus, the Federal Reserve Board found that Whitney-Jefferson is simply the means by which "Whitney banking offices" may be established on the East Bank of the Mississippi in Jefferson Parish.[1]

It is equally clear that Louisiana branch law prohibits a similarly situated State bank from following the Whitney-New Orleans approach to secure a banking office in Jefferson Parish. An application for such an office in the form of a "new" bank application would be rejected as an unlawful evasion of the Louisiana bank statutes. The Courts of Louisiana as do other State and Federal courts, pierce the corporate veil if the exigencies of the situation so demand,[2] and the Attorney General of Louisiana, con-

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[1] It should be noted that the Federal Reserve Board did not pass upon the question of whether Whitney-Jefferson would constitute an unlawful branch of Whitney-New Orleans. It considered the resolution of such a question as falling within the province of the Comptroller (R. 168). It is the validity of the Comptroller's decision on this matter which, of course, is the sole issue before this Court.

[2] *Meraux* v. *R. R. Barrow, Inc.*, 219 La. 309, 52 So.2d 863 (1951); *Brooks-Scanlon Co.* v. *Railroad Comm'n of Louisiana*, 144 La. 1086,

struing the branch provisions of Louisiana law within the factual context of this case, has ruled:

> ". . . that a bank holding company may not circumvent the branch bank laws of our State by the acquisition of a controlling interest in a subsidiary which is located in a parish other than the domicile of the parent company." (R. 164).

Petitioner Whitney-Jefferson endeavored below to deprecate the opinion of the Louisiana Attorney General. In doing so, it completely missed the point. No contention is being made that the opinion is "binding" on any court. The question is whether the opinion correctly construes Louisiana law. The opinion sets out in detail the philosophy behind the branch banking laws of Louisiana, and, under the "general principle of law that corporate entities must be disregarded where they are made the implements for avoiding a clear legislative purpose", concluded that a Whitney-New Orleans transaction attempted by a similarly situated State bank would be struck down as an evasion of Louisiana branch law. (R. 162-63). At least one indication that this was the prevailing view through the over 25 years in which branch banking restrictions have been in effect in Louisiana, La.R.S., §§ 6:54, 55, is to be found in the fact that, apparently, no one ever tried a Whitney-New Orleans type transaction until the instant case.[1] A further indication of the policy of Louisiana is the speed with which it acted in enacting Louisiana Law 275 of 1962, when faced with the first threat of a bank holding company.[2]

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81 So. 727 (1919); *Brown* v. *Benton Creosoting Co.*, 147 So.2d 89 (La. App. 1963).

[1] The source of Section 54 was Act No. 254 of 1938.

[2] Of course, the fact that the Louisiana legislature specifically acted in Louisiana Law 275 to prohibit all bank holding companies, cannot be construed as meaning that it sanctioned their use prior to that time to defeat Louisiana branch restrictions. *Cf.*, *Anderson* v. *Abbott*, 321 U.S. 349, 365 (1944), where this Court said, in an analogous situation: "Yet the fact that Congress later wrote specific

It is clear from the foregoing, that a certificate issued to Whitney-Jefferson would violate the positive, unequivocal and dominant expression of Congressional intent in the McFadden Act of 1927 and the Banking Act of 1933, to insure equality between National and State banks in the matter of branching. Whitney-New Orleans would be able to establish an additional banking office in a location prohibited to its competitor State banks. This Court should, therefore, affirm the court below on the grounds that Whitney-New Orleans' transaction defeats the legislative "policy of equalization" in branching which Congress adopted in Section 36(c) of the National Bank Act. Such action is required by the principle expressed in *Anderson* v. *Abbott*, 321 U.S. 349 (1944) where this Court said:

> "It has often been held that the interposition of a corporation will not be allowed to defeat a legislative policy, whether that was the aim or only the result of the arrangement. United States v. Lehigh Valley R. Co. 220 U S 257, 55 L ed 458, 31 S Ct 387; Chicago, M. & St. P. R. Co. v. Minneapolis Civic & Commerce Asso. 247 U S 490, 62 L ed 1229, 38 S Ct 553; United States v. Reading Co. 253 U S 26, 64 L ed 760, 40 S Ct 425. The Court stated in Chicago, M & St. P. R. Co. v. Minneapolis Civic & Commerce Asso. supra (247 U.S. p 501, 62 L ed 1237, 38 S Ct 553) that 'the courts will not permit themselves to be blinded or deceived by mere forms of law' but will deal 'with the substances of the transaction involved as if the corporate agency did not exist and as the justice of the case may require.'" 321 U.S. 349, 362-63.

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standards into the law means no more than a recognition on its part of an evil and a fashioning by it of a specific remedy. It can hardly mean that Congress by its earlier silence had sanctioned the use of the holding company to defeat the protection which it had provided for depositors of national banks."

> "If the judicial power is helpless to protect a legislative program from schemes for easy avoidance, then indeed it has become a handy implement of high finance. Judicial interference to cripple or defeat a legislative policy is one thing; judicial interference with the plans of those whose corporate or other devices would circumvent that policy is quite another. Once the purpose or effect of the scheme is clear, once the legislative policy is plain, we would indeed forsake a great tradition to say we are helpless to fashion the instruments for appropriate relief." 321 U.S. 349, 366-67

In the *Anderson* case this Court pierced the corporate veil of a bank holding company organized, in part, by a Louisville National bank on a share exchange basis, and held that the stockholders of the holding company (formerly the stockholders of the bank) were liable for an assessment on the shares of the National bank held in the portfolio of the holding company.

The *Anderson* case, and the cases cited by this Court therein, are, of course, expressive of what is now hornbook law that

> "Where the corporate form of organization is adopted or a corporate entity is asserted in an endeavor to evade a statute or modify its intent, the courts will disregard the corporation or its entity, and look at the substance and reality of the matter." Fletcher, Cycl. Corps., § 45 (1963).

Accordingly, the *Amicus Curiae* respectfully submits that, in view of the foregoing, the corporate veil of the intricate transaction here attempted should be pierced, and Whitney-Jefferson revealed as a forbidden branch of Whitney-New Orleans.

Attention will now be briefly turned to opposing arguments advanced by Petitioners.

D. *The arguments advanced by Petitioners that Congress intended, or contemplated, an avoidance of State branch law by the transaction here involved are without merit.*

Petitioners have recited in their briefs various differences between branch banking and the operations of a bank holding company system in support of their argument that the court below erred in holding that Whitney-Jefferson was, to all intents and purposes, a forbidden branch of Whitney-New Orleans.

Reduced to its essence, this argument simply comprises the contention that operating differences between group and branch banking are such that a subsidiary of a bank holding company can *never* be a forbidden branch under 12 U. S. C. 36(c), and, therefore, a court can *never* pierce the corporate veil of a bank holding system to find an evasion of the Congressional "policy of equalization" reflected in Section 36(c) of the National Bank Act. They would thus disagree with the only judicial expression directly in point in *First Nat'l Bank in Billings* v. *First Bank Stock Corp.*, 306 F.2d 937, 942 (9th Cir. 1962):

> "We do not agree with appellees that the fact that the two banks are separate corporate organizations demonstrates conclusively that one is not a branch of the other. In the banking field, as elsewhere, courts have power to 'pierce the corporate veil' when the realities require it."

Petitioners have not, and can not, advance any reasons why the Whitney-New Orleans type transaction should have a special exemption, not available anywhere else in the corporate world, from the doctrine of piercing the corporate veil to avoid evasion of legislative intent. Indeed, they have plainly misconceived the judicial thrust of the doctrine. In its application, courts do not deny the existence of operating differences between the corporations concerned. What they do is to examine the cir-

cumstances to ascertain whether the two corporations are being utilized in such a manner as to patently evade legislative policy. If so, the corporate distinction (and operating differences inherent therein) will be disregarded. This is precisely, of course, what this Court did in the *Anderson* case, *supra*, pp. 29-30, when it refused to allow National bank stockholders to avoid the assessment on their stock under the National Bank Act by exchanging the same for stock of a bank holding company, even though the transaction was entered into in good faith.

Petitioners, however, would go even further. They would contend, in the face of the positive and unequivocal expression of Congressional intent in the legislative history of Section 36(c) to assure a "policy of equalization" in the matter of branching for National and State banks (pp. 16-25 *supra*), that Congress somehow really actually intended an avoidance of the branch restrictions of Section 36(c) of the National Bank Act by the Whitney-New Orleans transaction here involved. They base this contention upon two subsidiary lines of argument: (1) a long recognition by Congress of the distinctions between group and branch banking; and (2) legislative history from the Banking Act of 1933, and the Bank Holding Act of 1956. These arguments are without merit.

Distinctions between group and branch banking. Petitioners' argument, as we read their briefs, runs something like this: because "of legal restrictions on branch banking, banks have resorted—both before and since 1927—to the alternative methods of chain banking and holding company banking so as to obtain as many of the advantages of branch banking as may legally be had" (Petitioner Whitney-Jefferson brief, p. 17); Congress has been aware of this practice and has never declared that it violated branch banking restrictions; and, therefore, the Whitney-New Orleans transaction squarely fits within

Congressional approval of this multiple-unit banking system tradition. The *Amicus Curiae* would quarrel with *all* of these propositions.[1]

To begin with, the implication of Petitioners' arguments to the effect that it is a common practice to organize a bank holding company in order to avoid State branch law; that the growth of the bank holding company system can be entirely attributed to this motivation; and

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[1] Argument in this brief will not embrace the question of "chain banking" raised in the foregoing quotation from the brief of Whitney-Jefferson Parish. Chain banking is not an issue in this case. It should be noted however, that if State law considers chain banking an evasion of branch banking—which is not the case in Louisiana—the *Amicus Curiae* would take the same position with regard to any effort to use the chain banking route to evade branch banking laws as it does toward the group banking transaction involved herein. In this respect, it agrees with the cogently reasoned dissent of Judge Bastian in *Camden Trust Co.* v. *Gidney*, 112 U.S. App. D.C. 197, 301 F.2d 521 (1962), *cert. denied* 369 U.S. 886. It should also be noted however, that it is quite reasonable for a state to take different positions with regard to chain and group banking insofar as they may be considered evasive of State branch restrictions. This is so because the two systems have one vital distinction, namely the element of control. Control in a chain banking system has the inherent limitation of terminating when stock ownership is dispersed through sales or through disposition in estates of the stockholders. On the other hand, group banking, involving corporate rather than individual stock control of one or more banks, has no such limitation, and control can be "locked in" perpetuity, as is obviously the case of a branch of a bank forming part of the same corporation. Lamb, *Group Banking*, pp. 55-58 (1961): Fischer, *Bank Holding Companies*, p. 19 (1961). It is because of the lack of control element that "the importance of chain banking has diminished over the years", Fischer, *supra*, at 19. Indeed, it was the very lack of control involved in chain banking which led the Whitney-New Orleans to choose the holding company route to acquire a banking office in Jefferson Parish (R. 32), although Petitioners' briefs would now appear to merge the concepts of chain and group banking and to suggest that they are merely different routes to achieve the same end, and that Whitney-New Orleans should therefore be able to follow through with its transaction to meet the competition alleged to have resulted from the fact that some of its competitor New Orleans banks have affiliate banks in Jefferson Parish under chain banking.

that therefore, there is nothing unusual or different about the Whitney-New Orleans transaction which merely reflects the mainstream of "twentieth century banking", are not an entirely faithful reflection of the history of the concept of bank holding companies. It is true, of course, that there are, and always have been, a number of advocates of unit banking who have opposed the very concept of bank holding companies as moving in the direction of branches to which they are vigorously opposed. But it does not follow from a recitation of such views that the impetus in the development of bank holding companies was, in fact, merely a desire to evade branch restrictions.

Prior to 1927, there were very few bank holding companies.[1] This fact in and of itself seems strange, in the light of Petitioners' contention, because National banks were then prohibited from establishing any branches and were suffering competitively where State law granted that privilege to their competitor State banks. (pp. 17-19, *supra*). Surely if the development of bank holding companies could be traced to a desire to evade branch restrictions, there would have been more of these systems at a time National banks were prohibited from establishing *any* branches.

The fact is that the great surge in the formation of bank holding companies took place in the relatively short period of time—between 1927 and 1930.[2] Fischer, in his scholarly and authoritative work on bank holding companies cited by both Petitioners, has set forth a number of reasons for this phenomenon, only one of which related to branch restrictions since many of these institutions were found in the leading branch banking states.[3] He gave considerable importance to such factors as (1) the

[1] "Banking Studies", note 1, p. 12 *supra*, at p. 134.

[2] *Idem.*

[3] Fischer, note 1, p. 33, *supra*, at 24.

need for rural bank reform, (2) the general merger movement of the 1920's, (3) the fear of other groups and loss of correspondent business; and (4) the bull market of the late 1920's.[1]

Nor is there any indication of any growth in bank holding companies after the 1927-30 surge reflecting a desire to avoid branch restrictions. Indeed, on the contrary, during the next decade the number of bank holding companies *declined* from a peak of 97 in 1931,[2] to 41 in 1939.[3] During the 1955 Congressional hearings preceding the passage of the Bank Holding Company Act of 1956, the number had further declined to 34.[4]

Furthermore, the type of bank holding companies existing at the time of the 1955 hearings bore no resemblance to the Whitney-New Orleans type transaction designed to avoid branch restrictions. Mr. Belgrano, the President of Transamerica Corp., one of the largest of the bank holding companies, gave a good description of these 34 *investment* companies as follows:

> "Individuals with funds to invest usually distribute their shareholdings among several different enterprises. They may invest in a single type of business or among different businesses. . . .
>
> Bank holding companies follow this same general pattern. There are approximately 34 bank holding companies today. . . .
>
> Like an individual, bank holding companies are interested in having sound and profitable investments. In varying ways and in varying degrees the com-

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[1] Fisher, *supra*, note 1, p. 33, at pp. 19-27.

[2] "Banking Studies", note 1, p. 13 *supra*, at p. 134.

[3] *Idem.*, at 136.

[4] Hearings before the House Committee on Banking and Currency, "Control and Regulation by Bank Holding Companies", 84th Cong., 1st Sess., p. 283, (1955).

panies lend financial and other assistance to the concerns whose shares they hold; . . ." [1]

Transamerica, like most of the larger bank holding companies, then held, in addition to bank stocks, substantial investments in insurance companies, real estate, manufacturing and industrial interests,[2] for it wes not until the Bank Holding Company Act of 1956 that bank holding companies were restricted in their non-bank holdings.[3]

In the light of the foregoing, Petitioners' efforts to argue that the Whitney-New Orleans transaction somehow fits within the mainstream of the multiple-unit banking tradition in this country which has been treated by Congress apart from branching, are to no avail. There is a vast difference between the typical bank holding company organized for investment purposes, which *is* in the mainstream of the multiple unit banking tradition, and the transaction here involved of one bank setting out to capitalize a holding company, and through it, an affiliate in an adjoining Parish, all for the purpose of avoiding State branching law. The Court below was therefore clearly correct in distinguishing the transaction here involved from the long-established bank holding company involved in the *Billings* case, *supra*, p. 31, which had been operating for 30 years and possessed stock in 87 banks with 94 offices. (R. 474). See also, South Da*kota* v. *The Nat'l Bank of South Dakota*, No. 17460 (8th Cir. Aug. 10, 1964). Slip. Op. 9, affirming the District Court in 219 F. Supp. 842 (S.D.S.D. 1963), where the court declined to pierce the corporate veil of the transaction there involved concerning, in part, the First Bank Stock Corporation. The Court there noted that this bank holding company "existed as a separate corporation own-

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[1] Hearings, *supra*, note 4, p. 35.

[2] Lamb, note 1, p. 33 *supra*, at p. 28.

[3] 70 Stat. 135, 12 U.S.C. § 1843.

ing stock of national and other banks, for a considerable period of time." It concluded that "in this respect, this case differs materially from *Whitney Nat'l Bank* v. *Bank of New Orleans & Trust Co.*, supra."

Nor is there any indication of an historical practice of Whitney-New Orleans type transactions of which Congress could have been aware, and thus have condoned through any silence. Indeed, clear-cut proof of this fact lies in the single statistic that there are only 52 registered bank holding companies today in all of America.[1] Surely if the Whitney-New Orleans type transaction had been "usual", banks in all of the many states which prohibit branching would have discovered this "good thing" long ago, and there would be more than just 52 such systems in America today! Or, stated differently, if the Whitney-New Orleans type transaction had been "usual", there would not have been a *decline* in the total number of bank holding companies since the early days of the branch bank restrictions of Section 36(c) of the National Bank Act!

Banking Act of 1933 and the Bank Holding Company Act of 1956. Finally, Petitioners endeavor to derive Congressional assent to the Whitney-New Orleans transaction from the fact (1) that Congress did not tie in branch banking restrictions to bank holding company operations at a time it was legislating on both subjects in the Banking Act of 1933, and (2) that the Senate struck a provision contained in the House version of the Bank Holding Company Act which would automatically apply State laws concerning branch banking to bank holding company operations. These facts, they contend, are conclusive of a Congressional expression of such a difference between group and branch banking that a subsidiary of a bank holding company can *never* be considered a forbidden branch under 12 U.S.C. 36(c).

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[1] As of December 31, 1963. 1964 Fed. Reserve Bulletin 783.

One simply cannot read the legislative history of the branch banking provisions of the Banking Act of 1933 (pp. 20-25, *supra*), with all of the emotion and vigor with which those great debates were charged, and conclude that at the same time Congress forged the final link in the "policy of equalization" in branch banking, it was intentionally authorizing an "out" through the Whitney-New Orleans type transaction. To the extent Congress did deal with bank holding companies in that legislation—and the issues surrounding bank holding company regulation by no means approached the intensity and importance of the branch banking amendments—it was concerned with the typical bank holding company, organized for *investment* purposes and usually holding, as noted above, non-bank as well as bank, securities in its portfolio. Therefore, the failure of Congress to tie-in such regulation with branch law cannot possibly be considered an indication of Congressional endorsement of the Whitney-New Orleans transaction, involving a single bank setting out to capitalize a holding company for the sole purpose of securing an affiliate in a location where it is prohibited from branching.

Nor can the Senate rejection of the House version of the Bank Holding Company Act rejecting a tie-in of branch laws to approval of bank holding companies be construed as endorsing the Whitney-New Orleans transaction. Opposition to this tie-in developed during the course of the hearings on the grounds that, because of the distinctions between branching and the orthodox bank holding company organized for investment purposes, a *State* might wish to handle group and branch banking in a different manner, and therefore, should not be bound by its branch banking policy in dealing with group banking. Chairman Martin of the Federal Reserve Board so testified:

> "As the Board has previously indicated, it believes that regulation of bank holding company groups

should not be related to the branch banking laws of the States and *that the States should be left free to deal differently, if they desire, with these two types of multiple office banking.*" (Emphasis supplied)[1]

And this is *precisely* what some States have done—although permitting branch banking, either unlimited or in some form, they have at the same time restricted or prohibited bank holding companies. Compare Appendix A and B of this brief.

But, again, the simple logic referred to earlier in this brief would conclusively answer Petitioners' contention. Surely, if Congress had intended, by its rejection of the House proposal to provide a tie-in of branch banking laws with bank holding company approval to give a "green light" to banks which wished to avoid the statutes of the many States which prohibit or restrict branch banking (Appendix A) by organizing bank holding companies, there would be more than just fifty-two bank holding companies registered under the Bank Holding Company Act today.[2]

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The present Comptroller of the Currency is a vigorous and able advocate of branch banking.[3] He believes that

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[1] Hearings, note 4, p. 35, *supra*, at p. 17. See also, Hearings Before a Subcommittee of the Senate Committee on Banking and Currency, "Control of Bank Holding Companies", 84th Cong., 1st Sess., pp. 47-48, 77-78 (1955).

[2] This figure represents an increase of only eight registered bank holding companies since the end of 1957, the first full year of the operation of the Bank Holding Company Act. See, "Recent Developments in the Structure of Banking", Special Staff Report of the Board of Governors of the Federal Reserve System submitted to the Select Committee on Small Business, United States Senate. Committee Print, 87th Cong., 2nd Sess., p. 9.

[3] See, e.g., Hearings before the House Committee on Banking & Currency (Conflict of Federal & State Banking Laws), 88th Cong., 1st Sess. (1963).

there should be unlimited branch banking on a National scale without regard to what he considers to be restrictive State branch laws. Others disagree with him. They believe that the question of branching should continue to be decided, as Congress has decreed, by State legislatures which can take into consideration local conditions which vary from State to State. This debate, however, is one which should be decided on the floor of Congress, not by an endorsement of intricate corporate maneuvers designed to evade State branching law by which he is bound under Section 36(c) of the National Bank Act. The desirability of the end result (in the Comptroller's opinion) does not justify such means, as the Court of Appeals below found.

Accordingly, Petitioners submit that the issuance of a certificate of authority to Whitney-Jefferson would constitute an unlawful evasion of the provisions of Section 36(c) of the National Bank Act. Such action would violate the positive, unequivocal and dominant expression of Congressional intent to insure equality between National and State banks in the matter of branching. The corporate veil of the intricate transaction here attempted should be pierced, and Whitney-Jefferson revealed as a forbidden branch of Whitney-New Orleans.

II. The issuance of a certificate of authority to Whitney-Jefferson would also be in violation of Section 3(5) of Louisiana Law 275 of 1962, enacted under a reservation of power from Congress to a state to prohibit or restrict the growth of bank holding companies incorporated under the laws of that State.

Section 3(5) of Louisiana Law 275 of 1962 prohibits any subsidiary of a bank holding company not now opened for business from doing so. This provision is part of a statute reflecting a policy of Louisiana to prohibit all bank holding company systems within the borders of the State.

As noted at pp. 10-16, *supra*, the question of whether a specific State law is applicable to National banks is not to be answered by reference to the broad and admitted generality that National banks are instrumentalities of the Federal Government and subject to the paramount authority of the United States. The answer lies in a search for Congressional intent as to the applicability of such State law to National banks. In the banking field Congress has given a special significance to the applicability of State law to the National banks which it has created. It has intended an applicability of such law in many of the most important areas of banking, either by specific adoption of such State law as the standard for National banks, or by declining to occupy the field so as to preclude the application of State laws to National banks which do not conflict with Federal law. It did so because only by a "policy of equalization" in basic competitive areas can the dual banking system, as a practical matter, survive.

Accordingly, the issue before this Court with regard to Louisiana Law 275 of 1962, is whether Congress intended to permit States to be more restrictive in their regulation of bank holding companies than is contained in the Bank Holding Company Act of 1956. A number of States, beside Louisiana, have considered this matter to have long since been settled law and have passed such statutes. (See Appendix B.) Petitioners now raise a general challenge to that proposition.

A. *In Section 7 of the Bank Holding Company Act, Congress has clearly and unequivocally expressed its intent that a State may prohibit, or restrict the expansion of, bank holding companies and their subsidiaries, whether National or State banks.*

Section 7 of the Bank Holding Company Act of 1956, 70 Stat. 138 (1956) 12 U.S.C. § 1846 (1958) reads as follows:

"§ 1846. Reservation of Rights to States.

The enactment by the Congress of the Bank Holding Company Act of 1956 shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof."

There is no question whatever but that when Congress reserved all powers and jurisdiction of the States over "banks" and "subsidiaries" of bank holding companies in the foregoing provision, it intended to embrace National bank subsidiaries, as well as State bank subsidiaries. The word "bank" is defined to mean "any national banking association or any State bank. . . ." 70 Stat. 133 (1956), 12 U.S.C. § 1841(c) (1958). The word "subsidiary" is defined to mean "any company" in a stated relationship to a bank holding company, 70 Stat. 134 (1956), 12 U.S.C. § 1841(d) (1958) and the word "company" is defined to mean "any corporation, business trust, association, or similar organization . . .", 70 Stat. 133 (1956) 12 U.S.C. § 1841(b) (1958). If the word "company" did not embrace a National bank, National bank subsidiaries would be completely exempt from *all* of the provisions of the Act.

There is also no doubt concerning the scope of the "powers and jurisdiction" which a State "now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof" which Congress intended to reserve to the States. *At the time the Bank Holding Company Act was passed there were several States which prohibited, restricted the expansion of, or regulated bank holding companies, some of which had been on the books for many years.* (See Appendix C attached hereto.) Congress was certainly aware of such statutes, and it would hardly have gone ahead and have reserved to the States the powers which a State "now has"

if it thought that these *existing* statutes were unconsitutional. Indeed, Senator Robertson of Virginia, the Chairman of the Senate Banking and Currency Committee, and the author and sponsor of the Bank Holding Company Act of 1956, made the following statement on the floor of the Senate with regard to the reservation of powers to the States in Section 7:

> "It should be noted that another provision of the Senate bill expressly preserves to the States their present authority over bank holding companies within their respective borders. Therefore, each State may, within the limits of its proper jurisdictional authority, enact legislation to regulate bank holding companies. Mr. President, *as an example of the type of legislation the States may enact*, I ask unanimous consent to have printed in the Record the text of a bill recently passed by the Georgia legislature." 102 Cong. Rec. 6752 (1956) (Emphasis supplied).

The text of the Georgia statute which Senator Robertson gave *as an example of the type of legislation the States may enact* is set forth herein as Appendix D, and should resolve *any* doubt as to the scope of the power over National bank subsidiaries which Congress intended to reserve to the States. That statute defined a "bank holding company" as a company incorporated under the laws of Georgia which controls "2 or more banks." In Section 2(a) a "bank" was defined as "any National bank or State bank." The statute, which carried heavy penalties, forbade any expansion of a bank holding company system beyond 2 banks.

The foregoing is clear and unequivocal. The *Amicus Curiae* must, therefore, differ strongly with the position taken by the Petitioners that the reservation of rights to the States in Section 7 was somehow weakened by the following language in the Senate Report:

> "In order to clarify the legislative history of section 7, the committee wishes to emphasize that this

> section does not grant any new authority to States over national banks." S. Rep. No. 1095, Part 2, 84th Cong., 2nd Sess., p. 5 (1956).

That sentence means just what it says: Section 7 does not constitute a grant of any *new* authority to the States which they do not already have beyond, for example, the authority contained in the Georgia statute which Senator Robertson gave as an example of a statute *which States may enact.*

Further, the legislative history of the Bank Holding Company Act makes it clear that the reservation of power to the States in Section 7 harmoniously meshes with the overall statutory scheme of the Bank Holding Company Act.

Thus, one of the purposes of the Act was to *supplement*, not *replace*, State authority. One of the major problems confronting States was their inability to prevent out-of-State bank holding companies from acquiring banks within the States. This was so because the States had no jurisdiction over such out-of-State companies inasmuch as they were not "doing business" there.[1] The Act, therefore, specifically barred any bank holding company from acquiring any additional bank, State or National, located outside of the State in which it maintains its principal office unless the statute of the State in which such additional bank is located authorizes an out-of-State bank holding company to acquire a State bank. 70 Stat. 135 (1956), 12 U.S.C. § 1842(d) (1958). It would be most incongruous for Congress to bar all out-of-State bank holding companies from operating in a State which by State statute restricts such a system, but to deny a State the right to restrict such systems within its own borders!

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[1] H.R. Rep. No. 609, 84th Cong., 1st Sess., pp. 3-4, 7 (1955); Hearings Before the House Committee on Banking and Currency, "Control and Regulation of Bank Holding Companies", 84th Cong., 1st Sess., pp. 160, 164-5, 175-6 (1955).

Another of the purposes of the Act was to set minimum standards for bank holding companies which State law could not contravene, but *not* to prohibit State law from being *more* restrictive regarding bank holding companies. The Senate report in referring to Section 7, makes this point clear:

> "In any event, another provision of this bill expressly preserves to the States a right to be more restrictive regarding the formation or operation of bank holding companies within their respective borders than the Federal authorities can be or are under this bill. Under such a grant of authority, each State may, within the limits of its proper jurisdictional authority, be more severe on bank holding companies as a class than (1) this bill empowers the Federal authorities to be or (2) such Federal authorities actually are in their administration of the provisions of this bill." S. Rep. No. 1095, Part 1, 84th Cong., 1st Sess., p. 11 (1955).

In the light of the foregoing, the *Amicus Curiae* submits that Congress has clearly and unequivocally expressed its intent that a State may prohibit, or restrict the expansion of, bank holding companies and their subsidiaries, whether National or State banks.

B. *Section 3(5) of Louisiana Law 275 of 1962 was enacted pursuant to Section 7 of the Bank Holding Company Act and is constitutional.*

Louisiana Law 275 of 1952, West's La. Rev.Stat.Anno., tit. 6, c. 12, § 1003(5) (1962 Supp.), does not violate the provision of Article VI, Clause 2 of the Constitution relating to the supremacy of federal law. If, as shown above, Congress has clearly and unequivocally expressed its intent that a State may prohibit, or restrict, the expansion of bank holding companies and their subsidiaries, whether National or State banks, then there is no conflict between Louisiana Law 275 of 1962 and federal law, and, therefore, no issue of constitutionality.

This position is sustained by all of the authorities on this point.

Braeburn Securities Corp. v. *Smith*, 15 Ill. 2d 55, 153 N.E. 2d 806 (Ill. Sup. Ct. 1958), concerned the Bank Holding Company Act of 1957 passed by the State of Illinois. Ill. Rev. Stats., C. 16½, §§ 71-76 (1961). This statute specifically defined à "bank" as meaning a "national banking association" (§ 72) and made it unlawful for any bank holding company to acquire control of more than 5% of the voting shares of "any bank" (§ 73 (2)). The Illinois Supreme Court upheld the applicability of the Act to National banks as follows:

> "In 1956 Congress adopted legislation regulating bank holding companies (12 U.S.C.A. § 1841 et seq.) and provided, among other things, that its action should not impair the then jurisdiction of the States, and further specifically provided that administration of the Federal act should be within the confines of State law if any. The Illinois legislation, as well as legislation in New York, New Jersey, Pennsylvania and Indiana, is an acceptance of the suggestion implied in the Federal act that the States should act if, as a matter of policy, bank holding company legislation more restrictive than the Federal act was desired by the States. Further, it seems clear that such State legislation could be applicable to national as well as State banks, since the Congress did not manifest an intent to pre-empt the legislative field. *People ex. rel. First Nat. Bank* v. *Brady*, 271 Ill. 100, 110 N.E. 864; *American Legion Post No. 279* v. *Barrett*, 371 Ill. 78, 20 N.E. 2d 45." 15 Ill. 2d at pp. 61-62, 153 N.E. 2d at p. 810.

The appeal in the *Braeburn* case was dismissed for want of a substantial federal question by the United States Supreme Court, 359 U.S. 311 (1959), an action even stronger than judicial affirmance. *Milheim* v. *Moffat Tunnel Improvement Dist.*, 262 U.S. 710, 716-717 (1923).

Further, the opinion of the Justices of the Supreme Court of New Hampshire was sought in 1959 on the constitutionality of a proposed bank holding company act which, like the Illinois statute, defined "bank" as including National banks, and made it unlawful for any bank holding company to acquire more than 5% of the voting shares "in any other bank." In *Opinion of the Justices*, 102 N.H. 106, 151 A. 2d 236 (N.H. Sup. Ct. 1959), the Court upheld the applicability of the Act to National banks as follows:

> "House Bill No. 272 would apply to national banks doing business in this state. These banks are instrumentalities of the Federal Government created for a public purpose and as such are necessarily subject to the paramount authority of the United States. *M'Culloch* v. *State of Maryland*, 4 Wheat. 316, 17 U.S. 316, 4 L.Ed. 579; *Davis* v. *Elmira Sav. Bank*, 161 U.S. 275, 283, 16 S.Ct. 502, 40 L.Ed. 700; *Henrys* v. *Raboin*, 395 Ill. 118, 69 N.E.2d 491, 169 A.L.R. 927; *Zarbell* v. *Bank of America Nat. Trust & Sav. Ass'n, Wash.*, 327 P. 2d 436. However the proposed bill would not be invalid unless it were found to interfere with the purposes of national banks or to destroy their efficiency or to be in direct conflict with some paramount federal law. *Nugent* v. *Mooney*, 3 Misc.2d 1067, 155 N.Y.S. 2d 611; *Millard* v. *National Bank of Detroit*, 338 Mich. 610, 61 N.W. 2d 804; *Franklin Nat. Bank of Franklin Square* v. *People*, 347 U.S. 373, 74 S. Ct. 550, 98 L.Ed. 767.
>
> "On May 9, 1956, Congress enacted the 'Bank Holding Company Act of 1956' 70 Stat. 133; 12 U.S.C.A. § 1841 et seq. Section 7 thereof (70 Stat. 138; 12 U.S.C.A. § 1846) is entitled 'Reservation of rights to States' and reads as follows: 'The enactment by the Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof.'

"As a result of this act and its provisions the question of whether our Legislature has 'the power or jurisdiction to legislate on this subject with reference to national banks chartered under the federal law * * is a question of much importance and perhaps of considerable difficulty.' *State* v. *People's National Bank*, 75 N.H. 27, 33, 70 A. 542, 545. However the Supreme Court of Illinois in the case of *Braeburn Securities Corporation* v. *Smith*, *supra* [15 Ill. 2d 55, 153 N.E. 2d 810], decided on September 18, 1958, held that 'it seems clear that such State Legislation [pertaining to bank holding companies] could be applicable to national as well as State banks, since Congress did not manifest an intent to pre-empt the legislative field.' An appeal from this decision to the United States Supreme Court was dismissed on April 20, 1959, 79 S.Ct. 876, for want of a su'bstantial federal question.

"Furthermore at least seven states (Illinois, New York, Indiana, Kansas, Pennsylvania and Massachusetts) have enacted legislation in this field since Congress passed the Bank Holding Company Act of 1956. It is our opinion based on the wording of the act, its legislative history and the factors enumerated above that House Bill No. 272 would not conflict with any federal statute." 102 N.H. at pp. 109-110, 151 A.2d at p. 239.

In view of the foregoing well-reasoned opinions, the *Amicus Curiae* submits that a State statute prohibiting the expansion of bank holding companies to include National banks within its system is clearly *not* in contravention to Federal law and is constitutional.

In their briefs, Petitioners seek to isolate Section 3(5) of Louisiana Law 275 as a *sui generis* expression, separate and apart from provisions of any other State bank holding company acts, thereby rendering any references to such other acts, or to the *Braeburn* and *Opinion of the Justices* cases, misplaced. This position appears to rest

on the distinction that some statutes, such as the one in Illinois, which prohibit a bank holding company from adding a National bank to its system, do so by prohibiting the acquisition of stock in such a National bank, whereas Section 3 of Louisiana Law 275 includes a number of ways by which a bank holding company is prohibited from adding a National bank it its system, including the provision in Section 3(5), here relevant, of prohibiting a subsidiary of a bank holding company not now open for business, from opening for business.

This is a distinction without legal significance. *Amicus Curiae* readily concedes that there is no other State bank holding company act (see Appendix B) which has exactly the phraseology of Section 3(5) of Louisiana Law 275. This was a special provision inserted by the Louisiana Legislature to meet the exigencies of the transaction involved herein and caused by Whitney's unsuccessful race to complete its program before the Louisiana legislature acted. But as far as the constitutional issues are concerned, there is no difference between provisions which seek to restrict the expansion of a bank holding company to include a National bank in its system (a) by prohibiting the acquisition of stock in such a bank, or (b) by prohibiting such a bank from opening for business, as in Section 3(5). The question in *both* cases is the extent to which Congress reserved the rights of the States to prohibit and restrict the expansion of bank holding companies, and that is the issue which has been explored in detail above.

The error in the position taken by the Petitioners is perhaps caused by its mistaken view that the Whitney-Jefferson Parish holds some special status by reason of the fact that it is already organized, and that all it requires to open up for business is a certificate of authority. There is no such special status. The issuance of the certificate of authority is *vital*. Without it, a National bank

is simply not a lawful bank authorized to do business even though its application may have been approved by the Comptroller. *Cf. Commercial State Bank of Roseville* v. *Gidney, supra,* citing *National Bank of Detroit* v. *Wayne Oakland Bank,* 252 F.2d 537 (6th Cir. 1958), *cert. denied,* 358 U.S. 830. Until the issuance of a certificate, a National bank, whether still on paper, or organized, is still in an embryonic stage. It is the very validity of the issuance of such a certificate which is at issue in this case.

* * * *

It is clear from the foregoing discussion that Section 3(5) of Louisiana Law 275 of 1962 is a constitutional exercise of the power reserved to the States by Section 7 of the Bank Holding Company Act of 1956. It follows, therefore, that Section 3(5) of Louisiana Law 275 of 1962 acts as a bar to the issuance of any certificate of authority to the Petitioner, Whitney National Bank in Jefferson Parish.

CONCLUSION

The *Amicus Curiae* respectfully submits, for the reasons stated, that the issuance of a certificate of authority to the Whitney National Bank in Jefferson Parish would constitute a manifest and unlawful evasion of the fundamental policy of Congress set forth in the branch banking provisions of the National Bank Act, by which the Comptroller is bound. The issuance of such a certificate would also patently violate the provisions of Louisiana Law 275 of 1962, passed under a reservation of power by Congress to the States in Section 7 of the Bank Holding Company Act of 1956.

The *Amicus Curiae* urges this Court to so find.

Respectfully submitted,

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APPENDIX A

Summary of Branch Banking Statutes Of The 50 States

States Permitting Unlimited Branch Banking

State:

Alaska
Alaska Statutes, 1962, Sec. 06.05.415.

Arizona
Arizona Revised Stat. Anno., Sec. 6-223 (1956).

California
Calif. Financial Code Anno., Sec. 500 (1955).

Delaware
2 Del. Code Anno., Title 5, Sec. 770 (Supp. 1962).

Idaho
Idaho Code, Sec. 26-1001 (Supp. 1963).

Maryland
Anno. Code of Md. 1957, Art. 11, Sec. 65.

Nevada
Nevada Revised Stat., Sec. 660.010 (1960).

North Carolina
Gen. Stat. of N. C., Sec. 53-62 (Supp. 1963).

Rhode Island
Gen. Laws of R.I., Sec. 19-1-13 (1956).

South Carolina
Code of Laws of S. C., Sec. 8-57 (1962).

Vermont
Vermont Stat. Anno., Title 8, Sec. 501 (1958).

States Permitting Restrictive Branch Banking

State:

Alabama
Acts of 1953, 1955, 1957; Code of Alabama, Title 5, Sec. 125(1).

Connecticut
Gen. Stat. of Conn., Revision of 1958, Sec. 36-59.

Georgia
Code of Ga. Anno., Sec. 13-203.1.

Hawaii
Revised Laws of Hawaii, C. 178, Sec. 39.

Indiana
5 Burns Ind. Stat. Anno., Sec. 18-1707.

Kentucky
Ky. Revised Stat., Sec. 287.180.

Louisiana
La. Revised Stat., Sec. 6:54 (1951).

Maine
Revised Stat. of Maine, Ch. 59, Sec. 19-C (1963 Supp.); Ch. 59, Sec. 124 (1963 Supp.)

Massachusetts
Mass. Gen. Laws Anno., Ch. 172, Sec. 11 (1963 Supp.); Ch. 172 A, Sec. 12.

Michigan
Mich. Stat. Anno., Secs. 23.762, 23.762(1).

Mississippi
Miss. Code, Secs. 5228, 5229.

New Hampshire
N.H. Rev. Stat. Anno., Sec. 384-B:2 (1963 Supp.).

State:

New Jersey
N.J. Stat. Anno., Sec. 17:9A-19.

New Mexico
N.M. Stat. Anno., Sec. 48-2-17.

New York
Book 4, Banking Law, Sec. 105.

Ohio
Page's Ohio Revised Code Anno., Title 11, Sec. 1103.09.

Oregon
Oregon Rev. Stat., Sec. 714.050.

Pennsylvania
Purdon's Pa. Stat. Anno., Title 7, Sec. 819-204.1.

South Dakota
S.D. Code of 1939, Sec. 6.0402.

Tennessee
Tenn. Code Anno., Sec. 45-211.

Utah
Utah Code Anno., Sec. 7-3-6 (Supp. 1963).

Virginia
Code of Va., Title 6, Art. 3, Sec. 6-26.

Washington
Revised Code of Wash. Anno., Sec. 30.40.020 (1961).

States Prohibiting All Branch Banking

States:

Arkansas
Ark. Stat. 1947 Anno., 1963 Supp., Sec. 67:205; Sec. 67-340-342.

State:

Colorado
Colo. Revised Stat., 1960 Perm. Supp., Sec. 14-13-1.

Florida
Fla. Stat. Anno., Sec. 659.06.

Illinois
Smith-Hurd Ill. Anno. Stat., Ch. 16½, Sec. 106.

Iowa *
Ia. Code Anno., Sec. 528.51.

Kansas *
Gen. Stat. of Kansas Anno., Sec. 9-1111 (1961 Supp.).

Minnesota
Minn. Stat. Anno., Sec. 48-34.

Missouri *
Vernon's Anno., Mo. Stat., Sec. 362.105, Sec. 362.107.

Montana *
Revised Codes of Mont. Anno., Sec. 5-1028 (1963 Supp.).

Nebraska *
Revised Stat. of Neb., Sec. 8-1, 105.

North Dakota *
N. D. Revised Code, Sec. 6-03-14.

Oklahoma *
Okla. Stat. Anno., Title 6, Ch. 19, Sec. 461 (1963 Supp.).

Texas

Vernon's Civil Stat. of Texas Anno., Art. 342-903.

West Virginia

W. Va. Code Anno., Sec. 3131.

Wisconsin *

West's Wisc. Stat. Anno., Sec. 221.04.

States With No Legislation Authorizing Branch Banking

States:

Wyoming

* These states permit certain offices with limited powers only. Arkansas permits a branch under one very limited circumstance.

APPENDIX B

Summary Of State Laws Affecting Bank Holding Companies (1963)

States Restricting Or Prohibiting Bank Holding Companies

State:

Georgia

Code of Georgia Anno., Sections 13-201.1, 13-207, enacted February 9, 1960 *.[1]

Illinois

Smith-Hurd Ill. Anno. Stat. Ch. 16½, Sections 71 through 76, enacted July 5, 1957.[2]

Indiana

Burns Ind. Stat. Anno., Sections 18-1814 through 18-1817, enacted March 12, 1957.[3]

Kansas

Gen. Stat. of Kansas Anno., Sections 9-504 through 9-507, enacted June 29, 1957.[3]

Kentucky

Ky. Revised Stat., Section 287.030, enacted in 1938.[4]

Louisiana

La. Revised Stat., Title 6, Ch. 12, Sections 1001 through 1006, enacted July 10, 1962.[5]

Michigan

Michigan Stat. Anno., Section 21.10, enacted October 17, 1933. (See *Peoples Savings Bank* v. *Stoddard*, 359 Mich. 297, 102 N.W. 2d 777, 792 (Supreme Court, 1960) (dictum) for applicability to National banks).

Mississippi

Miss. Code, Section 5235, enacted April 2, 1934

State:

Nebraska

Revised Stat. of Neb. Sec. 8-901 through Sec. 8-904, (1963 Supp.) enacted March 12, 1963 [3]

New Hampshire

N.H. Rev. Stat. Anno., Sec. 384-B:1 and Sec. 384-B:3, enacted October 1, 1963 [7]

New Jersey

N.J. Stat. Anno., Sections 17:9A-344 through 17:9A-354, enacted June 5, 1957 [6]

Oklahoma

Okla. Stat. Anno. Title 6, Ch. 21, Sections 551 through 554, enacted March 11, 1963 [2]

Pennsylvania

Purdon's Pa. Stat. Anno., Title 7, Sections 851 through 855, enacted July 11, 1957 [8]

Vermont

Vermont Stat. Anno., Title 11, Section 131, enacted April 1, 1915

Washington

Revised Code of Wash., Section 30.04.230, enacted February 27, 1933.[5]

West Virginia

W. Va. Code Anno., Section 3220, enacted February 28, 1959 (effective in 90 days).

States Permitting Bank Holding Companies With State Approval

State:

Florida

Fla. Stat. Anno., Section 659.14, enacted May 20, 1953.

State:

Massachusetts

Mass. Gen. Laws Anno., Ch. 167A, Sections 1 through 7, enacted September 21, 1957.

New York

Book 4, Banking Law, Art. III-A, Sections 141-147, first enacted January 29, 1957.

NOTE: The statutes of twelve states expressly include National banks. The statute of Florida is specifically limited in its application to State banks. The statutes of Louisiana, Michigan, and Mississippi apply generally to all banks doing business in those states. The Vermont statute speaks of "corporations", while the statutes of Kentucky and West Virginia present interpretive questions as to the extent of their coverage.

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[1] Company cannot acquire more than 5% of the stock of two or more banks.

[2] Company cannot acquire more than 15% of the stock of two or more banks.

[3] Company cannot acquire more than 15% of the stock of two or more banks.

[4] Company cannot acquire more than 50% of the stock of a bank.

[5] Company cannot acquire more than 25% of the stock of a bank.

[6] Company owning more than 25% of the stock of a bank cannot acquire more than 10% of the stock of another bank.

[7] Company is limited to 12 bank affiliates and 20% of state's bank deposits.

[8] The date of enactment is in each case the date that the statute presently effective became effective in its original form.

APPENDIX C

Summary of State Laws Restricting Or Prohibiting Bank Holding Companies Prior to the Passage of the Bank Holding Company Act of 1956[1]

State:

Georgia

Ga. Laws 1956, Vol. 1, pp. 309-312, enacted February 27, 1956. See Appendix D.[2]

Illinois

Ill. Laws 1955, 69th Gen. Assembly, at pp. 1372 and 1373, enacted July 11, 1955. Company cannot acquire more than 15% of the stock of two or more banks.[3]

Kentucky

See Appendix B.

Michigan

See Appendix B. Corporation may not hold bank stock unless it was acquired as part of a plan of reorganization.

Mississippi

See Appendix B. Prohibits bank holding companies.

South Carolina

See Appendix B.

Vermont

See Appendix B.

Washington

See Appendix B.

West Virginia

See Appendix B. Prohibits bank holding companies.

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[1] May 9, 1956.

[2] These sections, quoted in Appendix D, were repealed on February 9, 1960, when the presently effective Section 13-207 was enacted.

[3] Repealed on July 5, 1957, when the presently effective Sections 71-76 were enacted.

APPENDIX D

GEORGIA BANK HOLDING COMPANY ACT OF 1956

"BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA AS FOLLOWS:

SECTION 1. The maintenance of competitive services between banks has been found to be the best method of serving the public. There are dangers in the concentration of economic power through centralized control of banks. It is, therefore, held to be in the public interest to curtail such concentration of economic power by preventing the expansion of bank holding companies and similar organizations.

SEC. 2. Unless the context requires otherwise: (a) 'Bank' means any national bank or State bank, banking association, savings bank or trust company, whether organized under the laws of Georgia, the laws of another State, or the laws of the United States, doing business in the State of Georgia.

(b) 'Company' means any bank, corporation, partnership, joint stock company, business trust, voting trust, association or similarly organized group of persons, whether incorporated or not, and includes the shareholders, and those persons who otherwise own the company and including any foreign corporation or other organization or association doing business in Georgia, but shall not include any corporation or community chest, fund or foundation, organized and operated exclusively for religious, charitable, scientific, literary or educational purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation.

(c) 'Bank holding company' means any company incorporated or organized under the laws of the State of Georgia or doing business in Georgia, which directly or indirectly owns, controls or holds, with power to vote, 15 percent or more of the voting stock of each of 2 or more banks.

(d) A company will be construed to own, control or hold, with power to vote, stock indirectly whenever any officer or shareholder of such company or any natural person included within the definition of 'company' in section (b) of this Act or any member of the immediate family of such officer or shareholder or of such natural person, shall own, control or hold, with power to vote, such stock. Immediate family includes a spouse, children, mother, father, brother, and sister.

SEC. 3. It shall be unlawful for any company directly or indirectly to own, control, vote, or hold, with power to vote the same, 15 percent or more of the voting stock of each of 2 or more banks, except that it shall not be unlawful for a company to continue to own, control, vote, or hold, with power to vote, such voting stock as its own, controls, or holds on the effective date of this act. Also, in municipalities now having branches of a bank with a holding-company relation, such bank may make branches of existing holding-company banks; and in the future in cities of over 80,000 population, according to the 1950 or subsequent census, now having branches of a bank, present branches will have the same privilege of additional branches as permitted to other banks.

SEC. 4. It shall be unlawful for any company directly or indirectly to own, control, vote, or hold, with power to vote the same, 15 percent or more of the voting stock of a bank holding company, except that it shall not be unlawful for a company to continue to own, control, vote, or hold, with power to vote, that stock of a bank holding

company which it owns, controls, or holds on the effective date of this act.

SEC. 5. It shall be unlawful for any company hereafter to acquire, with power to vote the same, 15 percent or more of the voting stock of each of 2 or more banks, except that it shall not be unlawful for any company to acquire, with power to vote the same, any stock in banks, a majority of whose voting stock such company owns, holds, or controls on the effective date of this act.

SEC. 6. It shall be unlawful for any company to acquire, with power to vote the same, 15 percent or more of the voting stock of a bank holding company.

SEC. 7. It shall be unlawful for any foreign company owning, controlling, or holding, with power to vote the same, 15 percent or more of the voting stock of each of 2 or more banks, to vote more than 15 percent of the stock of more than 1 such bank in any 1 year, except that it shall not be unlawful for a company to vote that voting stock which it owns, controls, or holds on the effective date of this act.

SEC. 8. This act shall not apply to the holding by a company in respect of its owning, controlling, or holding, with power to vote, stock in a bank or banks or bank holding company or companies in a fiduciary capacity, unless such stock is held for the benefit of another company or for the benefit of a majority of the stockholders of such bank.

SEC. 9. Any company which violates any provision of this act shall, upon conviction, be fined not less than $500 nor more than $1,500. Each day on which such violation occurs will constitute a separate offense.

SEC. 10. If any provision of this act or the application of any such provision to any person or circumstance shall be held invalid, the remainder of the act, and the applica-

tion of such provision to persons or circumstances other than those to which it is held invalid, shall not be effected thereby.

SEC. 11. All laws and parts of laws in conflict with this act hereby are repealed.

(Ga. Laws 1956, Vol. I. pp. 309-312. Repealed February 9, 1960. See Code of Ga. Anno., Section 13-207)

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SUPREME COURT, U. S.

SUPPLEMENTAL APPENDIX TO BRIEFS FOR RESPONDENTS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

Nos. 26 and 30

WHITNEY NATIONAL BANK IN JEFFERSON PARISH, *Petitioner*,

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, BANK OF LOUISIANA IN NEW ORLEANS, GUARANTY BANK AND TRUST COMPANY, LAFAYETTE, LOUISIANA; AND STATE BANK COMMISSIONER OF THE STATE OF LOUISIANA, *Respondents*.

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY, *Petitioner*,

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL., *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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SUPPLEMENTAL APPENDIX

PREFACE TO APPENDIX

This appendix contains the Opinion of Frederick W. Lehmann, Solicitor General of the United States, dated November 6, 1911, which was concurred in by the Attorney General of the United States—same being taken from 75

Cong. Rec. 9899 (May 10, 1932), as it was inserted in the Record by Senator Carter Glass, Chairman of the Senate Banking and Currency Committee. Also included herein are excerpts from the Order and Opinion of May 6, 1963, of the Board of Governors of the Federal Reserve System in *Application of Trans-Nebraska Co.*, wherein the Board itself, after the decision of the District Court in this action, applied a State Baik Holding Company Act to deny an application similar to the one involved in the case at bar.

APPENDIX C

[Senate Document No. 92, Seventy-second Congress, first session]

LEGALITY OF CERTAIN AGREEMENTS CONCERNING HOLDINGS OF NATIONAL-BANK STOCK

Mr. GLASS presented the following opinion of Solicitor General Lehmann submitted to the Attorney General on November 6, 1911, relative to the legality of certain agreements and arrangements as to holdings of national-bank stocks:

DEPARTMENT OF JUSTICE,
Washington, D. C., November 6, 1911.

The ATTORNEY GENERAL.

SIR: You advise me that the President desires that there shall be submitted to him upon his return to Washington a fuller discussion of the question of the legality of the agreements and arrangements existing between the ———— ———— Bank of New York and the ———— ———— Co., a corporation of the State of New York.

On August 1, 1911, I submitted to you an opinion, in which you concurred, that the agreements and arrangements in question were means of enabling the bank to carry on business and exercise powers prohibited to it by the national banking act.

I have reconsidered the question with the care demanded by its importance, and have reached the conclusion that both the bank and the company, whether considered as affiliated or as unrelated, are in violation of the law.

At the outset it is well to consider the purposes which the framers of the national banking act had in view. The first, the paramount, purpose was to secure a uniform national system of currency, and to do this without the creation of a great central institution like the old United States Bank.

The opposition to such an institution was deep-seated and widespread, and the sponsors of the various plans which took final shape in the national banking act were careful to point out that the objections to the United States Bank had been duly considered and had been avoided by them.

In August, 1861, O. B. Potter, of New York, submitted to the Secretary of the Treasury a scheme to permit State banks and bankers to issue notes secured by United States bonds, saying: "*None of the objections justly urged against a United States bank lie against this plan.* It gives to the Government no power to bestow favors and does not place a dollar in its hands to lend: * * * It is impossible to see how such system can be made use of for political ends." (The Origin of the National Banking System, S. Doc. No. 582, pp. 46-48, 61st Cong., 2d sess.)

Samuel Hooper, a Member of the House from Massachusetts, was an active agent in the attainment of the end sought. In support of one of the early measures proposed, which, while it did not become a law, was a step in that direction, he said:

"*Thus are secured all the benefits of the old United States Bank without many of those objectionable features which aroused opposition.* It was affirmed that, by its favors, the Government enabled that bank to monopolize the business of the country. Here no such system of favoritism exists. * * * It was affirmed that frequently great inconvenience and sometimes terrible disaster resulted to the trade and commerce of different localities by the mother bank of the United States arbitrarily interfering with the management of the branches by reducing suddenly their loans and sometimes withdrawing large amounts of their specie for political effect. Here each bank transacts its own business upon its own capital, and is subject to no demands except those of its own customers and its own business. It will be as if the Bank of the United States had been divided into many parts, and each part endowed

with the life, motion, and similitude of the whole, revolving on its own orbit, managed by its own board of directors, attending to the business interests of its own locality; and yet to the bills of each will be given as wide a circulation and as fixed a value as were given to those of the Bank of the United States in its palmiest days." (Congressional Globe, 37th Cong., 2d sess., Pt. I, p. 616.)

In the national banking act as passed in 1863 it was believed that the desired result had been obtained.

Mr. Hugh McCulloch, president of a leading bank at Indianapolis, and distinguished as a financier, was induced, at great sacrifice to himself, to accept the office of Comptroller of the Currency and inaugurate the new system. In a letter to a friend published in the Banker's Magazine, Vol. XVIII, pages 8 and 9, he said:

"The national system of banking has been devised with a wisdom that reflects the highest credit upon its author to furnish to the people of the United States a *national-bank note circulation without the agency of a national bank.* It is not to be a mammoth corporation, with power to increase and diminish its discounts and circulation, at the will of its managers, thus enabling a board of directors to control the business and politics of the country. It can have no concentrated political power. Nor do I see how it can be diverted from its proper and legitimate objects for partisan purposes. It will concentrate in the hands of no privileged persons a monopoly of banking. It simply authorizes, under suitable and necessary restrictions, any number of persons, not less than five in number, in any of the States or Territories of the Union, to engage in the business of banking, while it prevents them from issuing a single dollar to circulate as money which is not secured by the stocks and resources of the Government. It is, therefore, in my judgment (as far as calculation is regarded), not only a perfectly safe system of banking, but it is one that is eminently adapted to the nature of our political institutions."

In his first report as Comptroller of Currency, made November 28, 1863, he says:

"By the national currency act the principle is for the first time recognized and established that the redemption of bank notes should be guaranteed by the Government authorizing their issue. The national currency will be as solvent as the nation of which it represents the unity. The country has at last secured to it *a permanent paper circulating medium of a uniform value, without the aid of a national bank.* This national system confers no monopoly of banking, but opens its advantages equally to all. It interferes with no State rights. It meets both the necessities of the Government and the wants of the people. It needs modifications, and may require others than those which are suggested in this report; but it is right in principle, and of its success there can, I think, be no reasonable doubt.

"This examination of the act, and the observation of the manner in which it is being administered, have resulted in the entering up of a popular judgment in favor of the national-banking system: A judgment, not that the system is a perfect one, nor free from danger of abuse, but that it is a safer system, better adapted to the nature of our political institutions; and to our commercial necessities, giving more strength to the Government, with less risk of its being used by the Government against the just rights of the States, or the rights of the people, than any system which has yet been devised, and that by such amendments of the act as experience may show to be needful, it may be made as little objectionable and as beneficial to the Government and the people as any paper-money banking system that wisdom and experience are likely to invent. It promises to give to the people that long-existing 'desideratum,' *a national currency without a national bank,* a bank-note circulation of uniform value without the creation of a moneyed power in a few hands over the politics and business of the country."

And again in his second report, made November 25, 1864.

When in his letter and reports Mr. McCulloch speaks of "a national bank-note circulation *without the agency of a national bank*," etc., he manifestly has reference to an institution national in the sense of being a central institution like the old United States Bank, operating throughout the country by means of branches.

The banks created by the national banking act were, and were designed to be, local institutions and independent of each other, but under national control and supervision. Nationalization without centralization was the keynote of the law. This is demonstrated by the structure of the banks provided for.

Reference will be made to the national banking act as contained in the United States Compiled Statutes, 1901. It is title 62, and consists of four chapters. The first chapter deals with "organization and powers," the second with "obtaining and issuing circulating notes," the third with "regulation of the banking business," and the fourth with "dissolution and receivership." The entire act is too long for reproduction here, but pertinent sections will be set out in full or in their substance.

Section 5133, "formation of national banking associations," provides:

"Associations for carrying on the business of banking under this title may be formed by any number of natural persons, not less in any case than five. They shall enter into articles of association, which shall specify in general terms the object for which the association is formed, and may contain any other provisions, not inconsistent with law, which the association may see fit to adopt for the regulation of its business and the conduct of its affairs. These articles shall be signed by the persons uniting to form the association, and a copy of them shall be forwarded to the Comptroller of the Currency, to be filed and preserved in his office."

It should be noted in passing that only "natural persons" may engage in the formation of a bank.

Section 5134, "requisites of organization certificate," provides:

"The persons uniting to form such an association shall, under their hands, make an organization in certificate, which shall specifically state:

"First. The name assumed by such association, which name shall be subject to the approval of the Comptroller of the Currency.

"Second. The place where its operations of discount and deposit are to be carried on, designating the State, Territory, or District, and the particular county and city, town or village.

"Third. The amount of capital stock and the number of shares into which the same is to be divided.

"Fourth. The names and places of residence of the shareholders and the number of shares held by each of them.

"Fifth. The fact that the certificate is made to enable such persons to avail themselves of the advantages of this title,"

By this section the bank is distinctly localized, for it requires that "the place where its operations of discount and deposits are to be carried on" shall be designated as to State, county and city, town or village, and it allows but one place.

This is repeated in section 5190, "place of business," which provides:

"The usual business of each national banking association shall be transacted at an office or banking house located in the place specified in its organization certificate."

By an act of May 1, 1886 (ch. 73, 24 Stat. 18), a bank was authorized to *change* its location, but not to a place more than 30 miles distant, and the new location must be within the same State. No provision has ever been made for

increasing the number of cities, towns, or villages in which a bank may do business.

Section 5138, "requisite amount of capital," provides:

"No association shall be organized with a less capital than $100,000, except that banks with a capital of not less than $50,000 may, with the approval of the Secretary of the Treasury, be organized in any place the population of which does not exceed 6,000 inhabitants, and except that banks with a capital of not less than $25,000 may, with the sanction of the Secretary of the Treasury, be organized in any place the population of which does not exceed 3,000 inhabitants. No association shall be organized in a city the population of which exceeds 50,000 persons with a capital of less than $200,000."

This, because of the small amount of capital required in such case, extends the facitities of national banking to the smallest communities.

Section 5146, "requisite qualifications of directors," provides:

"Every director must, during his whole term of service, be a citizen of the United States, and at least three-fourths of the directors must have resided in the State, Territory, or District in which the association is located, for at least one year immediately preceding their election, and must be residents therein during their continuance of office. Every director must own, in his own right, at least 10 shares of the capital stock of the association of which he is a director. Any director who ceases to be the owner of 10 shares of the stock, or who becomes in any other manner disqualified, shall thereby vacate his place."

Here the local character of the bank is secured. The directors must all be shareholders, they must all be citizens of the United States and three-fourths of them must be residents of the State.

The powers of the bank are conferred in general terms by section 5136, and they are, to have a seal, and perpetual succession, to make contracts, sue and be sued, elect officers and define their duties, and further—

"Sixth. To prescribe, by its board of directors, by-laws not inconsistent with law, regulating the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted, and the privileges granted to it by law exercised and enjoyed.

"Seventh. To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidence of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this title.

"But no association shall transact any business except such as is incidental and necessarily preliminary to its organization, until it has been authorized by the Comptroller of the Currency to commence this business of banking."

Section 5137 confers power to hold real property and limits it to such as may be necessary for "its immediate accommodation in the transaction of its business," and such as it may acquire in the way of securing payment of debts previously contracted, but real estate so acquired can not be held for a longer period than five years.

Section 5197 limits the rate of interest which may be taken to that "allowed by the laws of the State, Territory, or District where the bank is located."

This again emphasizes the local character of the institution.

Section 5201 prohibits a bank from loaning upon or purchasing its own shares.

It has been repeatedly held that the powers of a national bank are limited to those expressly granted by the act and such as are properly incidental to those granted.

In Logan County National Bank *v.* Townsend (139 U. S. 67, 1. c. 75), the court, speaking through Mr. Justice Harlan, said:

"It is undoubtedly true, as contended by the defendant, that the national banking act is an enabling act, for all associations organized under it, *and that a national bank can not rightfully exercise any powers except those expressly granted by that act, or such incidental powers as are necessary to carry on the business of banking for which it was established.* The statute declares that a national banking institution shall have power 'to exercise, by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions' of title 62 of the Revised Statutes."

And in California Bank *v.* Kennedy (167 U. S. 362, 1. c. 366) the court, through Mr. Justice White, said:

"*It it settled that the United States statutes relative to national banks constitute the measure of the authority of such corporations, and that they can not rightfully exercise any powers except those expressly granted, or which are incidental to carrying on the business for which they are established.* Logan County Bank *v.* Townsend (139 U. S. 67, 73). No express power to acquire the stock of another corporation is conferred upon a national bank; but it has been held that, as incidental to the power to

loan money on personal security, a bank may in the usual course of doing such business accept stock of another corporation as collateral, and by the enforcement of its rights as pledgee it may become the owner of the collateral and be subject to liability as other stockholders. National Bank *v.* Case (99 U. S. 628). So, also, a national bank may be conceded to possess the incidental power to accept in good faith stock of another corporation as security for a previous indebtedness. It is clear, however, that a national bank does not possess the power to deal in stocks. The prohibition is implied from the failure to grant the power. First National Bank *v.* National Exchange Bank (92 U. S. 122, 128)."

The proposition is an elementary one in corporation law and needs no elaboration.

It follows that while a bank may take the stocks of another corporation as collateral to a loan, or take them in payment of a debt previously incurred, it can not deal in stocks. The limit of its powers in this respect is stated by Chief Justice White in First National Bank *v.* National Exchange Bank (92 U.S. 122, 128):

" • • • In the honest exercise of the power to compromise a doubtful debt owing to a bank it can hardly be doubted that stocks may be accepted in payment and satisfaction, with a view to their subsequent sale or conversion into money so as to make good or reduce in anticipated loss. *Such a transaction would not amount to a dealing in stocks.*"

In First National Bank *v.* Converse (200 U.S. 425) a manufacturing company had failed, and the creditors, among whom was the bank, organized a new corporation to purchase the stocks, evidences of debt, and assets of the old, and to continue in the manufacture of the same articles that had been manufactured by the old company. This transaction was held to be without the powers of the bank. The court, page 439, said:

"• • • To concede that a national bank has ordinarily the right to take stock in another corporation as collateral for a present loan or as security for a preexisting debt *does not imply that because a national bank has lent money to a corporation it may become an organizer and take stock in a new and speculative venture; in other words, do the very thing which the previous decisions of this court have held can not be done.*"

As to acquiring the stocks of other national banks, the ruling of the court is very explicit.

In Concord First National Bank *v.* Hawkins (174 U.S. 364) the bank of Concord, N. H., had bought and held as an investment 100 shares of the stock of the Indianapolis National Bank. The last-named bank failed and Hawkins as receiver sued the Concord bank to recover the assessment which had been made upon the stock of the Indianapolis bank. The Concord bank denied liability upon the grounds that it had no right to hold the stock. The court refused to so much as to apply the doctrine of estoppel in favor of creditors. Referring to previous decisions of the court and to the distinction made by the circuit court between the acquisition of stocks in national banks and of stocks in other corporations, the court, page 368, said:

"No reason is given by the learned judge in support of the solidity of such a distinction, and none occurs to us. Indeed, we think that the reasons which disqualify a national bank from investing its money in the stock of another corporation are quite as obvious when that other corporation is a national bank as in the case of other corporations. *The investment by national banks of their surplus funds in other national banks, situated, perhaps, in distant States, as in the present case, is plainly against the meaning and policy of the statutes from which they derive their powers, and evil consequences would be certain to ensue if such a course of conduct were countenanced as lawful.* Thus, it is enacted, in section 5146, that "every director must, during his whole term of service, be a citizen

of the United States, and at least three-fourths of the directors must have resided in the State, Territory, or District in which the association is located for at least one year immediately preceding their election and must be residents therein during their continuance in office."

"One of the evident purposes of this enactment is to confine the management of each bank to persons who live in the neighborhood, and who may, for that reason, be supposed to know the trustworthiness of those who are to be appointed officers of the bank, and the character and financial ability of those who may seek to borrow its money. But if the funds of a bank in New Hampshire, instead of being retained in the custody and management of its directors, are invested in the stock of a bank in Indiana, the policy of this wholesome provision of the statute would be frustrated. The property of the local stockholders, so far as thus invested, would not be managed by directors of their own selection but by distant and unknown persons. *Another evil that might result, if large and wealthy banks were permitted to buy and hold the capital stock of other banks, would be that in that way the banking capital of a community might be concentrated in one concern, and business men be deprived of the advantages that attend competition between banks. Such accumulation of capital would be in disregard of the policy of the national banking law, as seen in its numerous provisions regulating the amount of the capital stock and the methods to be pursued in increasing or reducing it. The smaller banks in such a case would be in fact though not in form branches of the larger one.*

"Section 5201 may also be referred to as indicating the policy of this legislation. It is in the following terms:

" 'No association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a

debt previously contracted in good faith; and stock so purchased or acquired shall, within six months from the time of its purchase, be sold or disposed of at public or private sale; or in default thereof, a receiver may be appointed to close up the business of the association.'

"This provision forbidding a national bank to own and hold shares of its own capital stock would, in effect, be defeated if one national bank were permitted to own and hold a controlling interest in the capital stock of another."

Here is an express recognition and assertion of the local and independent character of our national banks and the denial of any power which would tend to create what is in effect a central bank with branches.

As to the transfer of its shares, a national bank has power only "to prescribe, by its board of directors, by-laws not inconsistent with law, *regulating the manner* in which its stock shall be transferred." Manner relates to method or form and not to substance. So the by-laws may require a formal indorsement of the outstanding certificate, the issuance of a new one, and a register of the transfer upon the books of the bank. But no condition can be imposed which limits or impairs the right of transfer.

The national banking act, as orginally passed in 1863, by section 36, denied to the stockholder "power to sell or transfer any share held in his own right so long as he shall be liable, either as principal debtor, surety, or otherwise, to the association for any debt which shall have become due and remains unpaid," etc.; but this provision was repealed by the act of 1864, which, with amendments, is the act now upon the books. The purpose of the repeal was to make the shares more readily transferable. Banks thereafter, however, attempted to enforce the restrictions of the original act by means of by-laws, but these have been held always to be invalid. Speaking to this subject in Bank *v.* Lanier, 11 Wall. 369, 1. c. 377-378, the court said:

"The power to transfer their stock is one of the most valuable franchises conferred by Congress on ban[illegible] asso-

ciations. Without this power it can readily be seen the value of the stock would be greatly lessened, and, obviously, whatever contributes to make the shares of the stock a safe mode of investment, and easily convertible, tends to enhance their value. It is no less the interest of the shareholder than the public that the certificate representing his stock should be in a form to secure public confidence, for without this he could not negotiate it to any advantage.

"It is in obedience to this requirement that stock certificates of all kinds have been constructed in a way to invite the confidence of business men, so that they have become the basis of commercial transactions in all the large cities of the country and are sold in open market the same as other securities. Although neither in form nor character negotiable paper, they approximate to it as nearly as particable. If we assume that the certificates in question are not different from those in general use by corporations—and the assumption is a safe one—it is easy to see why investments of this character are sought after and relied upon. No better form could be adopted to assure the purchaser that he can buy with safety. He is told, under the seal of the corporation, that the shareholder is entitled to so much stock, which can be transferred on the books of the corporation, in person or by attorney, when the certificates are surrendered, but not otherwise. This is a notification to all persons interested to know that whoever in good faith buys the stock and produces to the corporation the certificates regularly assigned, with power to transfer, is entitled to have the stock transferred to him. And the notification goes further, for it assures the holder that the corporation will not transfer the stock to anyone not in possession of the certificates."

This ruling holding the restrictive by-law to be invalid was repeated in Bullard *v.* National Eagle Bank (18 Wall. 594), Third National Bank *v.* Buffalo German Ins. Co. (193 U. S. 581), and in many cases on the circuit and in the State courts.

If the law was changed to permit a transfer, when to deny it was in the immediate interest of the bank, it surely never was the purpose to authorize a restriction upon transfer in behalf of any interest foreign to the bank, and with which it is forbidden that the bank, as a bank, may be identified.

From the history of the national banking act, from its terms and provisions, and from the decisions of the Supreme Court construing it, these propositions are derived:

I. The banks are local institutions and independent of each other, none the less that they are creatures of Federal power and subject to Federal supervision and control.

II. A bank may in its by-laws regulate the manner in which its shares may be transferred, but it can not impair or limit the right of transfer.

III. As to business operations, the bank has such powers as are expressly granted by the act and such as are properly incidental to those expressly granted, and none other, and so can engage only in the business of banking as that business is defined by the act.

IV. It is neither banking nor an incident of banking to invest the funds of the bank in another business in any manner or to any extent; and the bank has, therefore, no right to invest its funds in the stocks of another corporation, and especially not in the stocks of another national bank.

V. The powers of a national banking association are and can be granted only by the United States, and as no grant of such powers is made by the act to any State corporation they may not be exercised by such a corporation.

These propositions relate to matters of substance, and so may be no more evaded than violated. Indirection, if it accomplishes the same purpose, stands upon the same footing with direction.

Coming now to the case in hand, we have to consider what is the practical effect of the creation of the ——— ——— Bank and its affiliation with the ——— ——— Company.

So far as concerns matters of form, it may be conceded that the ——— ——— Bank was incorporated as an independent institution. Still its certificate of incorporation while not compelling dependence upon or interrelation with any other institution does provide for it. Its business powers and capacities are very extensive. They authorize the acquisition of any kind of property and the conduct of any kind of business and the doing of whatever may be incident thereto. (See art. 2 of the certificate of association). The only limitation upon its business activities is to be found in Paragraph VIII of Article II, and this is:

"• • • but nothing herein contained shall be construed as authorizing the business of banking nor as including the business purpose or purposes of a money corporation or a corporation provided for by the banking, insurance, railroad, and the transportation corporations laws, or an educational institution or corporation which maybe incorporated as provided in the education law, nor as authorizing or intending to authorize the performance at any time of any act or acts then unlawful."

As the business of banking, which must be taken to include the business of banking under the national banking laws, is expressly prohibited, the powers of the company *as granted by its charter* do not offend the Federal laws.

The tenth article provides in its first paragraph that "the directors of the company need not be stockholders," and in the second paragraph that—

"No transaction entered into by the company shall be affected by the fact that the directors of the company were personally interested in it, and every director of the company is hereby relieved from any disability that might

otherwise prevent his contracting with the company for the benefit of himself or any firm, association, or corporation in which he may be in anywise interested."

These provisions in and of themselves violate no Federal statutes, but they give a facility for serving two masters, which is, to say the least, unusual; and they do permit the use of the company as a mere instrumentality or convenience of some other institution.

The capital stock of the company is by the third article fixed at $10,000,000, but it is provided by paragraph 5 of article 10 that—

"The board of directors shall have absolute discretion in the declaration of dividends out of the surplus profits of the company, and they may accumulate such profits to such extent as they may deem advisable instead of distributing them among the stockholders, and may invest and reinvest the same in such manner as in their absolute discretion they may deem advisable."

Thus, while there is a limit placed upon the capital stock of the company, there is none upon the actual capital it may accumulate, and so none upon its possible financial power.

These various provisions of the certificate of incorporation are important to be considered in view of the use which has been made of the company.

The certificate is dated July 5, 1911, but prior to that date on June 1, 1911, an agreement was entered into between the ———— ———— Bank as the first party [three names of prominent persons eliminated] trustees, as the second party, and [five names of prominent persons eliminated] and other subscribers, "who are shareholders of the said bank," as parties of the third part. In the agreement these parties are designated, respectfully, as "the bank," "the trustees," and "the subscribers."

The trustees are all of them officers of the bank. Mr. ———— is the chairman of the board of directors, Mr. ———— is its president, and Mr. ———— is a director. The agreement, then, is one between the bank, its officers and its shareholders, and, as will be seen, the officers and shareholders are dealt with not as individuals but as officers and shareholders.

The preamble recites that—

"Opportunities and facilities for making desirable investments, *other than those which are possible in the ordinary course of the banking business*, are, from time to time presented to the officers of the bank, which they desire to make available to the shareholders of the bank."

Here is the declared purpose to do something, make investments, not within the scope of the bank's powers. That the officers and shareholders of the bank as individuals may make such investments is conceded, but that the bank, or its officers or shareholders, as officers and shareholders, may do so; in other words, that the powers and facilities granted by the national banking act may be used for purposes outside the ordinary course of banking business is denied.

The first article of the agreement provides for the organization of an investing company. It is here called the United States Investing Co. It is, however, the ———— ———— Company under a provisional name.

It is not within the scope of the bank's powers to have part or lot in such an agreement, for the simple reason that the formation of an investing company, under State corporation laws, is not the conduct of banking under national laws. And what is true of the bank is true of its officers and shareholders acting as such.

The second article accords to each shareholder of the bank, as a right, a beneficial interest, through the trustees, in the capital stock of the investing company, to the

extent of two-fifths of the par value of his capital stock in the bank, provided he exercises his right by executing the agreement or by having his bank stock stamped as thereafter provided in the agreement. If the shareholder does not exercise his right in time, the trustees may determine the conditions upon which he may do so thereafter.

The par value of the capital stock of the bank is $25,000,000, and two-fifths of this is ten millions, which is the par value of the stock of the investing company. Every shareholder of the bank exercising his right, the stock of the company is fully provided for.

It is contended that the shareholder of the bank is not required to take his allotted beneficial interest in the company, but manifestly, he is under strong compulsion. The bank and the company, as will be seen from later provisions of the agreement, are so closely bound together that the welfare of the company will always be the serious concern of the bank. For better or for worse the bank and the company are united. The shareholder, if he is not in the arrangement, must none the less hazard the worse and get none of the better, and so, inasmuch as against his will he is in for the worse, he will in self-protection go in further and entitle himself to the better.

The third article provides that in order to facilitate participation by the shareholders of the bank in the beneficial interests in the company, the trustees will recommend to the directors of the bank the declaration of a special dividend of 40 per cent on the capital stock of the bank, which will amount to $10,000,000, or the exact amount of the capital stock of the company. The subscribers, shareholders of the bank, agree to apply the dividend to the payment of the stock of the company.

The recommendation of the trustees, officers of the bank, assented to by the bank and by two-thirds of the shareholders, was sure to be adopted, but not even as against a dissenting or nonassenting minority, no matter how small

that minority might be, was there a right to declare a dividend except as such declaration was made in the interest of the bank and its shareholders as such. And there is a larger interest, that of depositors and of the National Government, which requires that the bank shall be conducted as a bank pure and simple and not as a promoting agency of speculative investment companies.

The fourth article requires that the subscribers at once assign the special dividend to the trustees in order to enable the trustees to organize the investing company.

This only emphasizes the fact that the resources and facilities of the bank were utilized to create the investing company.

The fifth article provides (1) that the stock of the investing company shall be issued to the trustees and shall be held by them and their successors in trust, and (2) that the beneficial interest of the subscribers in this stock "shall not be transferable separately, but only by the transfer of the shares of stock of the bank held by them, respectively, and every sale or transfer of stock of the bank by a subscriber or his successor shall include the beneficial interest of such subscriber or his successor in the capital stock of the investing company attaching to the shares of the bank so sold or transferred."

The first clause of this article limits the number of stockholders in the company to three, the three being the trustees and their successors in trust.

Article 9 of the agreement provides:

"The number of trustees hereunder shall not be less than three. Any trustee may, at any time, resign. In case of any vacancy in the number of trustees, it shall be filled by the remaining trustees by the selection of some one who is an officer or a director of the bank: And any trustee who shall cease to be an officer or a director of the bank shall thereupon also cease to be a trustee hereunder; *it being*

intended that only officers or directors of the bank shall act as trustees.

"No trustee shall be liable for the acts of any other trustee, but shall be liable only for his own willful misconduct.

"The trustees may act by a majority, either at a meeting or by writing with or without a meeting; and they may vote in person or by proxy."

Thus only officers or directors of the bank can ever be stockholders in the company, for the trustees hold the stock and only officers and directors of the bank can be trustees. And the trustees are a self-perpetuating body. Any vacancy is to be filled by the remaining trustees.

By article 8 it is provided that the trustees and such other persons as they may designate, who shall be officers or directors of the bank, shall constitute the first board of directors of the company, and that no one shall ever be a director of the company who is not also an officer or director of the bank.

The certificate of incorporation of the company provides for five directors, but it has only three stockholders; therefore it was provided in the certificate that directors need not be stockholders.

The second clause of article 5 prohibits transfer of beneficial interests in the company without a transfer of the corresponding shares of the bank, and, conversely, prohibits transfer of shares in the bank without a transfer of the corresponding beneficial interest in the company.

Article 6 provides for certain indorsements upon the certificate of bank shares and upon the certificates of beneficial interest in the company. These indorsements are in aid of the plan and purpose of the agreement.

Article 7 requires payment of company dividends to be made to shareholders of the bank whose certificates of bank shares are stamped or indorsed as provided in article

5. Payments of these dividends may be made by the trustees to the bank, and such payment will relieve the trustees from further liability on their account.

Article 10 provides for the amendment, modification, or termination of the agreement. Any of these can be accomplished only "with the written consent of the trustees and of two-thirds in interest of those for whom the capital stock of the investing company is then held by the trustees."

This, then, is the situation: The company was not independently organized, but was organized by the bank, its officers and shareholders, acting as such. Only shareholders of the bank were permitted an interest in the company and these only in the proportion of their holdings in the bank. This constitution of the interests of the company must continue to the end, for no one can ever come into the company without coming into the bank, and no one can ever go out of the company without going out of the bank. The bank, by declaration of a dividend, furnished the entire capital of the company. No person can be an officer or director of the company unless he is an officer or director of the bank.

This is not all. The company has no independence of action. It has no control or authority over its own affairs. It is to be remembered that all its stock is to be held by the trustees, and of course, is to be voted by them. Plenary power over the company is therefore held by these trustees. Now, these trustees were not elected by the incorporators of the company nor by its stockholders. They were nominated by the agreement between the bank, its officers and shareholders, made before the company was in existence. They can not be removed, nor can their successors be elected or determined by any power or interest of the company. The trustees, nominated by the agreement, perpetuate themselves. They appoint their own successors. The only power outside themselves which can make a change in their membership is the shareholding body of the bank. The shareholders by not continuing a trustee as an officer or

director of the bank eliminate him as a trustee. The official organization of the company and the vesting of its powers are determined and can be determined only by the corporate action of the bank.

And the agreement which accomplishes all these things is beyond the scope of the legitimate action of the bank to change or terminate. Two-thirds of the shareholders of the bank and the trustees must agree before there can be a change in it or an end of it. In this matter, so material to the welfare of the bank, the shareholders and the directors have abdicated their powers and duties and abandoned them to a minority of their number and the three trustees.

To facilitate the conduct of the business of the company by the officers of the bank, article 10 of the certificate of incorporation of the company provides that no transaction entered into by the company shall be affected by the fact that its officers or directors are contracting for their own benefit, or for the benefit of any firm, association, or corporation in which they may be interested in any wise.

This arrangement between the bank and the company virtually consolidates them, unifies their every interest, and requires that all the powers and capacities of both shall always be exerted in unison—or it does not.

If we have two institutions, and not one, chartered as each one of them is by public authority, and by different sovereignties, then each has its own peculiar mission and its own distinctive rights and duties, powers, and obligations. The bank is not concerned with the company, except as it might be with any other possible borrower of its funds, and the company is not concerned with the bank, except as it might be with any other institution whose funds it might wish to borrow. The band will not be influenced to lend money in aid of any enterprise in which the company may be engaged, because of that fact, and the company will not, because of its relations with the bank, look to it the more readily for financial support. The business of

each will be conducted with regard to its own distinctive advantage.

If these institutions are twain in the substantial sense indicated, then the arrangement which places the control of the company so absolutely and irrevocably under trustees appointed by the bank, and subject to change only by the corporate action of the bank, offends the fundamental law that "no servant can serve two masters; for either he will hate the one and love the other, or else he will hold to the one and despise the other." This law is implied in every line of the charter of the bank, and the attempt to repeal it in the tenth article of incorporation of the company is vain and nugatory.

If, however, the mission of the bank and the mission of the company are alike and linked always in interest and welfare, if the rights and duties of the two are necessarily harmonious and reciprocal, if the bank at all times must cooperate with the company and the company with the bank, if the officers and directors of the bank who are also the officers and directors of the company can not come into the predicament of divided allegiance, and, indeed, are in the service of but one master, then the bank involved is engaged, participating in, and conducting the business of the company, business beyond its chartered powers, business that is not national banking.

Only the absolute unity and identity of interest between the two institutions would afford moral excuse for the fusion of their powers under one control, but that excuse can not justify transgression of the positive mandate of the national banking act, which, from considerations of public interest, has determined that national banking shall be a business apart to be conducted by institutions organized for that purpose and for no other.

I am constrained to conclude that as to the bank the agreement violates the law, in its details, because it impairs and limits the right of transfer of shares and because it assumes to bind the bank beyond the possibility of re-

lease by the majority action of its shareholders and directors, and its general plan and scope, because it embarks the bank in business and ventures beyond its corporate powers.

The operations under this agreement are proper to be considered, and what is said in this connection is based upon a letter of date July 26, 1911, from President ———— to United States Attorney ————.

At that date $9,679,000 of the capital stock of the company had been paid up, showing that more than 96 per cent of the shareholders of the bank had come into the arrangement.

The company had made investments in the shares of 16 different banks and trust companies, the aggregate number of shares being 29,178. The market value of these was not shown. In addition, approximately $3,200,000 had been invested in other companies of different character.

Of the banks, nine were national banks. The number of shares held by the company and the total number of shares of the capital stock of the banks is as follows:

Bank	Company's holdings	Total number of shares of capital stock of bank
Second National Bank of New York	10	10,000
Fletcher American National Bank of Indianapolis	167	20,000
American National Bank of Indianapolis[1]	250	...
Fourth Street National Bank of Philadelphia	500	30,000
National Shawmut Bank of Boston	1,000	35,000
Riggs National Bank of Washington	2,240	10,000
National Butchers and Drovers Bank of New York	3,000	3,000
Lincoln National Bank of New York	4,324	10,000
National Bank of Commerce of New York	9,800	250,000

[1]No such bank shown in the American Bank Reporter.

Thus the company holds the entire capital stock of the National Butchers and Drovers Bank, not even deducting the shares, 10 each, which its nine directors are by the law required to hold in their own right. This bank surely is not independent of the ———— ———— Bank, in view of the relations of each to the company.

The company wants but 677 shares to hold a majority of the capital stock of the ———— ———— ————, and practically it may be said that when 4,324 out of 10,000 shares are held in one ownership, the control of the corporation has been secured.

If the ———— ———— Bank may extend its powers to the control of two other national banks, there is no limit to what it may do in that way. If the power exists, there is no restraint upon its exercise. By different methods and under other forms the ———— ———— Bank is doing, and in larger measure, what the Supreme Court in Concord First National Bank *v.* Hawkins, supra, declared to be in contravention of the national banking act.

And the ———— ———— Co., considered by itself and apart from its relations to the ———— ———— Bank, is also in violation of law. Its charter from the State of New York expressly prohibits it from the business of banking. And that charter could not confer the power to engage in the business of national banking. Such power could be conferred only by the laws of the United States.

Section 5133, quoted above, confers the power to form a national banking association only upon "natural persons." Other sections of the law restrict the place of operations of the association to a single city, town, or village, and require that its directors shall be natural persons, all of whom have a substantial interest in the bank and three-fourths of whom must be citizens, and residents of the State in which the association operates. Then, too, as we have seen, the bank may not as an investment acquire the shares of another bank, or, indeed, of any other corporation. The

purpose and result are that each national bank must be a local, independent institution, managed by natural persons, and not linked by proprietary interest with any other business than that of national banking.

It is not necessary to consider whether the national banking act absolutely prohibits the holding of shares in a national bank by a State corporation to any extent or for any purpose, and it may be conceded that a State corporation may acquire such shares as an incident to securing payment of a debt and hold them to a convenient time for sale, or that an institution like a trust company may hold them in a fiduciary capacity, but certainly there can be no holding of such shares by any corporation when the result is to defeat the policy of the national banking act; that is, to destroy the local character of the bank, break down its independence, vest its control in another corporation, and link it in substantial proprietary interest with some other business than national banking.

The ———— ———— Company may embark in almost any business whatever, and in fact has made large investments in other enterprises than banking. It has acquired ownership of all the stock of the National Butchers and Drovers Bank, a virtually controlling interest in the Lincoln National Bank, and interests of magnitude in other national banks.

The ownership of property implies duties as well as rights. As the company owns all the shares of the Butchers and Drovers Bank it has a duty with respect to them. It must vote them at shareholders' meetings, it must elect the directors of the bank, and decide important questions of policy. If this is not conducting the business of a national bank, how shall it be characterized?

In Anglo-American Land Co. *v.* Lombard (122 Fed. Rep. 721, l. c. 736) the Court of Appeals for the Eight Circuit, in an opinion by Van Devanter, J., now a Justice of the Supreme Court, held that the acquisition by a Missouri

company of the stock, and control of a Kansas company was illegal. He said:

"* * * Where it is not otherwise provided, the implication in a grant of corporate power and life is that the corporation shall exercise its powers and carry on its business through its own officers and employees, and not indirectly, through another corporation operated under its control, *and that it shall maintain an independent corporate existence, and not surrender the control of its affairs or the exercise of its powers to another corporation.* Conceding that a corporation of a private character, not charged with any public duties, may, in pursuance of appropriate action on the part of its stockholders, sell all of its property, wind up its affairs, and permanently retire from business, still, *in the absence of express authorization, neither the corporation nor its stockholders can, incidental to the sale of its property or otherwise, clothe another corporation with the right to maintain the corporate life or exercise the corporate powers.* These views are sustained, and the reasons therefor are fully set forth in De La Vergne Co. *v.* German Savings Institution (175 U. S. 40, 54, 20 Sup. Ct. 20, 44 L. Ed. 66), Buckeye Marble & Freestone Co. *v.* Harvey (Tenn.), (20 S. W. 427; 18 L. R. A. 252; 36 Am. St. Rep. 71), Easum *v.* Buckeye Brewing Co. (C. C.), (51 Fed. 156), and in the cases there cited."

We are dealing with corporations of a public character, with national banks, which have public duties to perform, and of these it is a peculiar obligation "to maintain independent corporate existence and not surrender control of their affairs or the exercise of their powers to another corporation."

No authority is given by the Federal statutes to the National Banking Association for assigning their powers and delegating their duties to a corporation created by a State, and which, under its charter from the State, may engage in a business and exercise powers denied to the banking association by the law of its creation.

Here again it is to be observed that if the power in question exists, it exists without limit. The company may extend its power to the full control of all the banks into which it has made entrance. Nor need it stop with these. As it grows by what it feeds upon it may expand into a great central bank, with branches in every section of the country. It is in incipient stage, a holding company of banks, with added power to hold whatever else it may find to be to its advantage.

Where public law and public policy are involved, forms and fictions are disregarded and the facts are dealt with as facts. In the Northern Securities case (193 U. S. 197) the securities company had acquired the majority of the shares of two great competing railway companies, and this was dealt with in effect as a consolidation of the railway companies. Harlan, judge, affirming the decree of the circuit court, said (p. 326):

"The stockholders of these two competing companies disappeared, as such, for the moment, but immediately reappeared as stockholders for the holding company which was thereafter to guard the interests of both sets of stockholders as a unit, and to manage, or cause to be managed, both lines of railroad as if held *in one ownership*. Necessarily, by this combination or arrangement, the holding company in the fullest sense dominates the situation in the interest of those who were stockholders of the constituent companies; as much so, for every practical purpose, as if it had been itself a railroad corporation which had built, owned, and operated both lines for the exclusive benefit of its stockholders. Necessarily, also, the constituent companies ceased, under such a combination, to be in active competition for trade and commerce along their respective lines, and have become, practically, one powerful consolidated corporation, by the name of a holding corporation the principal, if not the sole, object for the formation of which was to carry out the purpose of the original combina-

tion under which competition between the constituent companies would cease."

So in the *Standard Oil Case* (221 U.S.) and in the *Tobacco Case* (221 U. S. 106) the holding of stocks by the principal companies in the various subsidiary companies was recognized and dealt with as engaging in, directing, and controlling the business of the subsidiary companies.

Here the ———— ———— Company is not simply to control banks, but it may engage in any business whatever, even that forbidden by its charter, if, despite its charter prohibition as to certain kinds of business, it may invest in the stocks of companies conducting such business. The other enterprises in which the company is engaged may stand in need of credit and of funds, and it is too much to expect that the company's banks will deal simply as banks, equitably and impartially as between its own subsidiaries and persons and corporations with whom it is not affiliated. The temptation to the speculative use of the funds of the banks at opportune times will prove to be irresistible. Examples are recent and significant of the peril to a bank incident to the dual and diverse interests of its officers and directors. If many enterprises and many banks are brought and bound together in the nexus of a great holding corporation, the failure of one may involve all in a common disaster. And if the plan should prosper it would mean a union of power in the same hands over industry, commerce, and finance, with a resulting power over public affairs, which was the gravamen of objection to the United States Bank.

I conclude the ———— ———— Company in its holdings of national-bank stocks is in usurpation of Federal authortiy and in violation of Federal law.

Respectfully submitted.

FREDERICK W. LEHMANN,
Solicitor General.

APPENDIX D

FEDERAL RESERVE

press release

For immediate release May 6, 1963.

The Board of Governors of the Federal Reserve System today announced its denial of the application of Trans-Nebraska Co., Lincoln, Nebraska, for permission to become a bank holding company by acquiring over 50 per cent of the outstanding common stock of The Martell State Bank, Martell, Nebraska, The Sioux National Bank of Harrison, Harrison, Nebraska, and Crawford State Bank, Crawford, Nebraska.

Attached are copies of the Order and Statement of the Board.

Attachments

UNITED STATES OF AMERICA

BEFORE THE BOARD OF GOVERNORS OF THE

FEDERAL RESERVE SYSTEM

WASHINGTON, D. C.

Docket No. BHC-66

In the Matter of the Application of

TRANS-NEBRASKA Co., Lincoln, Nebraska

for permission to became a bank holding company

Order Denying Application Under Bank Holding Company Act

There has come before the Board of Governors, pursuant to section 3(a)(1) of the Bank Holding Company Act of 1956 (12 U.S.C. 1842) and section 222.4(a)(1) of Federal Reserve Regulation Y (12 CFR 222.4(a)(1)), an application on behalf of Trans-Nebraska Co., Lincoln, Nebraska, for permission to become a bank holding company by ac-

quiring over 50 per cent of the outstanding common stock of the Martell State Bank, Martell, Nebraska, The Sioux National Bank of Harrison, Harrison, Nebraska, and Crawford State Bank, Crawford, Nebraska.

As required by section 3(b) of the said Act, the Board gave notice of receipt of the application to the Comptroller of the Currency and to the Director of Banking of the State of Nebraska, soliciting their views. *The Comptroller submitted a recommendation, dated July 3, 1962, that the application be approved.* The State Director of Banking also recommended, by letter of June 11, 1962, that the application be approved; *however, by letter of September 26, 1962, he informed the Board that a poll of bankers in the State by the Nebraska Bankers Association indicated substantial opposition to bank holding companies and that, had he known this at the time of his letter of June 11, he would not have recommended approval of the application.*

Notice of receipt of the application was published in the Federal Register on May 18, 1962 (27 F. R. 4748), affording opportunity for submission of comments and views regarding the proposed transaction. Thereafter, a public hearing, ordered by the Board pursuant to section 222.7(a) of the Board's Regulation Y (12 CFR 222.7(a)), was held before a duly selected Hearing Examiner; proposed findings of fact and conclusions of law were submitted by the parties; and the Hearing Examiner filed a Report and Recommended Decision wherein denial of the application was recommended. Applicant submitted exceptions, with supporting brief, to the said Report and Recommended Decision, and Protestants filed a reply to the exceptions.

Having considered all matters properly before the Board in this proceeding,

IT IS HEREBY ORDERED, for the reasons set forth in the Board's Statement of this date, that the said application be and hereby is denied.

Dated at Washington, D. C., this 6th day of May, 1963.

By order of the Board of Governors.

Voting for this action: Chairman Martin, and Governors Balderston, Mills, Robertson, Shepardson, and Mitchell.

Absent and not voting: Governor King.

(Signed) MERRITT SHERMAN
Merritt Sherman,
Secretary.

(SEAL)

BOARD OF GOVERNORS

OF THE

FEDERAL RESERVE SYSTEM

Application of Trans-Nebraska Co., Lincoln, Nebraska, for Permission to Become a Bank Holding Company By Acquiring More Than 50 Per Cent of the Outstanding Common Stock of the Martell State Bank, Martell, Nebraska, The Sioux National Bank of Harrison, Harrison, Nebraska, and Crawford State Bank, Crawford, Nebraska

STATEMENT

Trans-Nebraska Co. ("Applicant"), Lincoln, Nebraska, filed an application, pursuant to section 3(a)(1) of the Bank Holding Company Act of 1956 ("the Act"), for permission to become a bank holding company by acquiring more than 50 per cent of the outstanding common stock of The Martell State Bank, Martell, Nebraska, The Sioux National Bank of Harrison, Harrison, Nebraska, and Crawford State Bank, Crawford, Nebraska.

Background.—Following the filing of the application and pursuant to requirement of the Act, *views on the application were requested of the Comptroller of the Currency* and the Director of Banking for the State of Nebraska. Notice of receipt of the application was also transmitted to the United States Department of Justice and was published in the Federal Register on May 18, 1962 (27 F.R. 4748). *By letter dated July 3, 1962, the Comptroller recommended that the application be approved.* The State Director of Banking, by letter of June 11, 1962, also recommended approval; however, on September 26, 1962, he advised the Board that the results of a poll of bankers in the State by the Nebraska Bankers Association indicated substantial opposition to bank holding companies, and stated that—

> "Had I had this information before me at the time that I was considering the . . . application, I would, of course, not have recommended that your Board act favorably upon the application, as I feel that this is a problem for the bankers to decide and not for the Director of Banking."

A number of requests were received by the Board from bankers in Nebraska for a public hearing on the application, and because of the interest manifested in the proposal the Board concluded that, although not required by law, the public interest would be served by scheduling such a proceeding. The hearing, notice of which was published in the Federal Register of August 17, 1962 (27 F.R. 8233), was held in Omaha, Nebraska, on October 2-5, 1962, before Hearing Examiner David London, who was selected for such purpose by the United States Civil Service Commission pursuant to section 11 of the Administrative Procedure Act (5 U.S.C. 1010). . . .

On the basis of the factual record made at the hearing, including the Hearing Examiner's report and the pleadings described above presenting argument based upon the hear-

ing record, the Board has reached the decision hereinafter indicated.

Statutory factors.—Section 3(c) of the Act requires the Board to take into consideration the following five factors: (1) the financial history and condition of the holding company and banks concerned; (2) their prospects; (3) the character of their management; (4) the convenience, needs, and welfare of the communities and the area concerned; and (5) whether the effect of the acquisition would be to expand the size or extent of the bank holding company system involved beyond limits consistent with adequate and sound banking, the public interest, and the preservation of competition in the field of banking. . . .

Financial history and condition.—Since Applicant is a proposed new corporate structure, the formal organization of which has been held in abeyance pending the Board's decision on the instant application, it has no financial history. The holding company's financial condition following organization would be satisfactory, assuming effectuation of the organizational plan as set forth in the application.

So far as concerns the banks involved, the Hearing Examiner found their financial history and condition to be satisfactory. The Board concurs.

Prospects.—With respect to the proposed subsidiary banks, the Hearing Examiner found as follows:

> "The record . . . establishes that the future prospects of the three banks involved are, by and large, intimately related to the economy of the regions in which they are located. The economies of Crawford and Harrison, while by no means dynamic, appear to be stable, and the economy of the Martell area, being located near the State Capital, gives indications of growth, albeit not aggressive. Accordingly, it is concluded, and Protestants concede, that the future prospects of the three banks involved are not unfavorable, and this would be true whether or not they were to become affiliated with the proposed holding company sysfem."

The Board concurs.

The Hearing Examiner found, and the Board concurs, that since Applicant's assets would consist principally of the stock of the three proposed subsidiary banks, its prospects, from the standpoint of profitable operations may reasonably be regarded as paralleling those of the banks in question and, therefore, also may be adjudged as not unfavorable.

The Board notes, however, that the growth prospects of the three proposed subsidiary banks, and hence their potential for more profitable operations in the future, are limited because of the economies of the geographical areas in which they are located. This fact is recognized by Applicant both in the application and in the testimony of its witnesses at the public hearing. Accordingly, it would appear that Applicant's prospects for enhancing the profitability of its operations would be contingent largely upon the addition of additional banks to the holding company system. *In this regard, however, the Board also notes that on March 12, 1963, the Governor of the State of Nebraska signed into law a bill which, completely apart from the question of its effect on Applicant's proposed organization, would in any event appear to prohibit further acquisition of banks by holding companies in the State. The Board is of the opinion that this development would further limit Applicant's prospects....*

Convenience, needs, and welfare.—The Hearing Examiner concluded that—

> "Consideration of the entire record compels the conclusion that establishment of the proposed holding company would not have a significantly favorable effect upon the convenience, needs, or welfare of the communities or areas concerned."

The Board concurs.

Effect of proposer acquisition on adequate and sound banking, public interest, and banking competition.—The

Hearing Examiner found that, so far as the size or extent of the proposed holding company system is concerned, its formation would not be inconsistent with adequate and sound banking, the public interest, and the preservation of competition in the field of banking. The Hearing Examiner went on to state, however, that—

> "... it is manifest from the legislative history of the Act that the thread of public interest runs throughout the various statutory criteria which must be considered, and I have serious reservations regarding the compatibility of my findings regarding the management and capital structure of the proposed holding company with the public interest." [Footnote omitted]

The Board does not share the Hearing Examiner's reservations regarding the management of the proposed holding company nor his concern about the lack of an anticipatory firm underwriting commitment insofar as concerns the company's program for financing its acquisition of the Crawford and Sioux National banks. However, as pointed out by the Hearing Examiner, the legislative history of the Act shows a pervading concern on the part of the Congress that the "public interest" be given a prominent position in the Board's evaluation of applications under the Act, and the Board is of the opinion that there are features of the proposed method of financing which would be contrary to the public interest....

This latter circumstance might not be objectionable were the holding company to have dynamic prospects for growth and expansion, either through growth of the subsidiary banks or through possible acquisition of additional banks, since such prospects might reasonably be expected to present a favorable climate for enhanced earning potential and capital appreciation of the public's investment in the holding company stock. However, such is not the case here. The proposed subsidiary banks are all small and their growth pattern has been slow and sporadic, with the possibility of a more favorable trend in the furture conceded

by Applicant to be quite limited. *Furthermore, in all likelihood legislation recently enacted by the State of Nebraska would prevent further expansion of Applicant's system through acquisition of additional banks (if, indeed, it would permit Applicant to consummate even its initial plans).*

Accordingly, the Board is faced with a situation where, for all practical purposes, the holding company involved apparently would be frozen in its present posture with the chances of any significant enhancement of earnings on, or capital appreciation of, its stock speculative at best. This being the case, the Board does not feel that the proposal embodied in the application would be in the public interest in terms of what the public investors could expect to receive, either initially or in the future, in return for their investment.

It should be emphasized that the Board is not questioning the integrity, character, or good faith of the organizers of the proposed holding company. *However, for the reasons stated it is believed that consummation of the proposed arrangement would be adverse to the interests of the potential investors, and consequently adverse to the public interest.*

Accordingly, under the circumstances presented in this case, it is the judgment of the Board that the application should be denied.

May 6, 1963.

Office Supreme Court, U.S.
FILED
OCT 6 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1964

Nos. 26 and 30

WHITNEY NATIONAL BANK IN JEFFERSON PARISH,
Petitioner,

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, BANK OF LOUISIANA IN NEW ORLEANS, GUARANTY BANK AND TRUST COMPANY, LAFAYETTE, LOUISIANA; AND STATE BANK COMMISSIONER OF THE STATE OF LOUISIANA, *Respondents.*

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY,
Petitioner,

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT BANKS

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October 5, 1964

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

Page

Questions Presented 2

Respondents' Counter-Statement of the Case

1. Introduction 3

2. The Facts 10

Summary of Argument 45

Argument

I. The Court of Appeals correctly enjoined the Comptroller of the Currency from licensing, under 12 U.S.C. § 27, a proposed banking operation admittedly conceived, designed and proposed solely for the purpose of evading, defeating and violating the prohibitions of the National Bank Act (12 U.S.C. § 36c) 45

A. The decision of the Court of Appeals was based on the "*realities*" of this case. Mere differences in "*form*" do not salvage corporate devices established to evade the law ... 52

B. Under the "realities" of this case, petitioner Whitney was formed to operate as an illegal *branch* or *additional office* of Whitney-New Orleans, and there are no provisions of the National Bank Act or of the Federal Bank Holding Company Act which require the rescue of this illegal proposal 57

C. The Court of Appeals correctly distinguished the "realities" of this case from those of the *Billings* and *Camden* decisions 60

D. The Court of Appeals thus properly rendered summary judgment in favor of respondent banks 64

II. The Court of Appeals' decision is wholly in accord with and gives great force and effect to a policy Congress has been seeking to accomplish for approximately 35 years 68

Page

III. The District Court likewise correctly enjoined the Comptroller from licensing under 12 U.S.C. § 27 a banking operation further directly prohibited by the Louisiana Bank Holding Company Act, adopted by Louisiana pursuant to rights expressly reserved to the States by the Federal Bank Holding Company Act 77

IV. The Court of Appeals and the District Court correctly held that respondent banks had standing to sue the Comptroller of the Currency to enjoin him from arbitrarily and capriciously licensing an unlawful operation, aimed at defeating the National Bank Act which it is his duty to administer. Such suit in no respect constitutes a collateral attack upon a decision of the Federal Reserve Board made under a different statute and involving totally different matters and different parties 84

A. Respondent banks' standing to sue 84

B. The District Court clearly had jurisdiction to entertain this action and affirmance of the Court of Appeals on its standing to sue holding is absolutely essential 91

C. This suit to enjoin the Comptroller from licensing the opening of an unlawful banking operation *under the National Bank Act* in no respect represents a collateral attack upon a decision of the Federal Reserve Board made under a different statute, and *in a case involving entirely different matters and different parties* 96

D. There is absolutely no merit to the Comptroller's contention that Congress required the issues here raised to be presented to and settled by the Federal Reserve Board 103

Conclusion 105

Appendix A 107

Appendix B 108

Supplemental Appendix C .....Separate Cover

Supplemental Appendix D .....Separate Cover

TABLE OF CITATIONS

CASES: Page

Alabama Power Company v. *Federal Power Commission*, 94 F. 2d 601 (D.C. App.) 47
Alabama Power Company v. *Ickes*, 302 U.S. 464 87
Atlas v. *Eastern Airlines, Inc.*, 311 F. 2d 156, 162 (CCA 1, 1962), *cert. denied*, 373 U.S. 904 (1963) 39, 65
Bank of New Orleans and Trust Co., et ano. v. *Board of Governors of the Federal Reserve System*, No. 19, 788, CCA 5 30
Bloeth v. *New York*, 82 S. Ct. 661, 662 (1962) 65
Braeburn Securities Corp. v. *Smith*, 15 Ill. 2d 55, 153 N.E. 2d 806 (1958) Appeal dismissed for want of a substantial federal question, 359 U.S. 311 ....41, 77
Callanan Road Company v. *United States*, 345 U.S. 507 102
Camden Trust Company v. *Gidney, Comptroller of the Currency*, 112 U.S. App. D.C. 197, 301 F. 2d 521, *cert. denied*, 369 U.S. 886 (1962) 45, 60
City of Tacoma v. *Taxpayers of Tacoma*, 357 U.S. 320.. 102
Columbia Broadcasting System, Inc. v. *United States*, 316 U.S. 407, 423 88
Commercial State Bank v. *Gidney*, 174 F. Supp. 770, affd. 278 F. 2d 871 (D.C. App. 1961) 37, 42, 45, 79, 88
Corker v. *Soper*, 53 F. 2d 196 (CCA 5, 1931), *cert. denied*, 285 U.S. 540 (1932) 38, 45
Corn Products Refining Company v. *Benson*, 232 F. 2d 554, 565 (CCA 2) 47
Douglas v. *Kentucky*, 168 U.S. 488 .....41, 83
East New York Savings Bank v. *Hahn*, 326 U.S. 230, 233 83
Far East Conference v. *United States*, 342 U.S. 570 .. 102
Federal Power Commission v. *Colorado Interstate Gas Company*, 348 U.S. 492 102
Ferguson, Attorney General of Kansas v. *Skrupa*, 372 U.S. 726 (1963) 41, 83
First National Bank of Billings v. *First Bank Stock Corp.*, 306 F. 2d 937 (CCA 9, 1963) 48, 60
First National Bank of St. Louis v. *Missouri*, 263 U.S. 640 68
First National Bank of Springfield v. *Saxon*, U.S. D.C., E.D.N.C. 91

Page

Fitzpatrick v. *Commonwealth Oil Company*, 285 F. 2d 726, 730 (CCA 5) 47
Francis O. Day, Inc. v. *Shapiro*, 267 F. 2d 669 (D.C. App.) 47, 52
Frost v. *Corporation Commission*, 278 U.S. 515 ..... 42, 88
Home Building and Loan Association v. *Blaisdell*, 290 U.S. 398, 437, 444-448 83
J. B. Montgomery, Inc. v. *United States*, 206 F. Supp. 455 (D.C. Colo., 1962) affd. 376 U.S. 389 (1964) .. 90
Mercantile National Bank at Dallas v. *Langdeau*, 371 U.S. 555, 559 (1963) 41, 79
Metropolitan Holding Company v. *Snyder*, 79 F. 2d (CCA 8, 1935) 38, 46, 47, 67
Milheim v. *Moffat Tunnel Improvement Dist.*, 262 U.S. 710, 716, 717 (1923) 78
Myers v. *Bethlehem Corporation*, 303 U.S. 41 102
National Labor Relations Board v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 503 (1951) 65
Northern Securities Company v. *United States*, 193 U.S. 197 ..... 38, 46
Opinion of the Justices of New Hampshire, 151 A 2 236 78
Schenley Distillers Corporation v. *United States*, 326 U.S. 432 46
Seattle v. *Berger*, 376 U.S. 224 102
Stark v. *Wickard*, 321 U.S. 288 ..... 42, 88, 89
Stone v. *Mississippi*, 101 U.S. 814 41
Tennessee Electric Power Company v. *TVA*, 306 U.S. 118 87
Trans-Nebraska Company, FHB No. BHC-66 83
Union Savings Bank of Patchogue v. *Saxon*, D.C. App. 1964, No. 18,145, F. 2d 37, 45
United States v. *Crocker-Citizens National Bank*, U.S. D.C., N.D., Cal. 3/23/64 94
United States v. *First National Bank and Trust Company of Lexington*, 84 S. Ct. 1033 (1964) 48
United States v. *Lehigh Valley R. Co.*, 220 U.S. 257 .. 46
United States v. *Philadelphia National Bank*, 374 U.S. 321 (1963) 10, 12, 79
United States v. *Reading Co.*, 253 U.S. 26 46

Page

United States v. *Third National Bank of Nashville*, D.C., Tenn. 9/29/64 94
Wayne Oakland Bank v. *Gidney, Comptroller of the Currency*, CCA 6, 1958, 252 F. 2d 537, *cert. denied*, 358 U.S. 838 .....9, 37, 42, 45, 79, 87
Wisconsin Bankers Association v. *Robertson*, 190 F. Supp. 90, 94 affd. 294 F. 2d 714 (App. D.C.), *cert. denied*, 368 U.S. 938, rehearing denied, 368 U.S. 979 (1961) 9, 42, 87

STATUTES AND REGULATIONS:

Administrative Procedure Act:

(5 U.S.C. 1001, 1009) 91, 92

Bank Merger Act:

12 U.S.C. § 1828(c) 76

Banking Act of 1933:

12 U.S.C. § 36 .....22, 38

Constitution of the United States:

Article III 9

Federal Bank Holding Company Act of 1956:

12 U.S.C. § 1841, Note 76
§ 1841(b) 80
§ 1841(c) 80
§ 1842(a) 22
§ 1842(b) 4, 30
§ 1842(d) 4, 30
§ 1845 .....55, 58, 82
§ 1846 .....4, 80, 82
§ 1847 .....4, 80, 82
§ 1848 .....4, 80, 82
Section 11 (70 Stat. 139), 12 U.S.C. 1841, Note. 76
28 U.S.C. § 1331 91

Louisiana State Bank Holding Company Act 275 of 1962:

§ 3(5) .....77 et seq.

Louisiana Revised Statutes: Page

La. R.S. 6:54 77
328 77
6:1001 (1962 Supp.) .....77 et seq.
6:1006 (1962 Supp.) .....77 et seq.
1001 82
1002 82

McFadden Act, Section 7(c), 44 Stat. 1228 68

National Bank Act, of June 3, 1864:

12 U.S.C. § 21 .....44, 76
§ 22 .....44, 76
§ 23 .....44, 76
§ 24 31
§ 25 44
§ 26 44
§ 27 .....44, 45, 82
§ 36c 44, 59, 67, 76
§ 36f 38
§ 51 79
§ 56 79
§ 85 79
§ 91 57
§ 93 57
§ 214(c) 79
§ 215(b) 76
44 Stat. 223-24 (1926) 12 U.S.C. § 548 (1958) .. 79
49 Stat. 191 (1933) as amended, 12 U.S.C. § 85 (1958) 79
64 Stat. 456 (1950) 12 U.S.C. § 214c (1958) .. 79
§ 215(b)(c) 76
76 Stat. 688 (1962), § 92(a) 79

National Bank Act:

R. S. § 5134 68
R. S. § 5190 68

MISCELLANEOUS: Page

Chapman "Concentration of Banking" pp. 110, 111 .. 68

75 Cong. Record; May 10, 1932:

9893 71
9898 ..... 69, 72
9899 ..... 69, 72
9901 ..... 69, 70
9904 ..... 69, 70
9975 73
9984 73

76 Cong. Record:

1997 73
3726 73

84 Cong. Record:

6752 2d Sess. 4, 80
6753 2d Sess. 4, 80
6853 2d Sess. 4, 80
8021 1st Sess. 4, 80

Corpus Juris Secundum 30, § 105, p. 506 52

Fletcher Cyclopedia Corporations—(1963 Rev. Ed.) Vol. 1, Ch. 2, § 45, pp. 240, 241 47

House Report 609, 84th Cong., 1st Sess, pp. 1, 2, 3 74

P. L. 511, 84th Cong. 2d Sess. 74

S. Doc. 173, 75th Cong. 3d Sess. 73

Senate Report:

77 —73d Cong.—1st Sess. p. 10 73
473 —69th Cong.—1st Sess. p. 8 70
584 —72d Cong.—1st Sess. p. 2 71
1095—84th Cong.—2d Sess. Part 11, p. 5 .. 75, 81

U. S. Code & Congressional News, 1956, p. 2493 81

IN THE

Supreme Court of the United States

October Term, 1964

Nos. 26 and 30

WHITNEY NATIONAL BANK IN JEFFERSON PARISH,
Petitioner,

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, BANK OF LOUISIANA IN NEW ORLEANS, GUARANTY BANK AND TRUST COMPANY, LAFAYETTE, LOUISIANA; AND STATE BANK COMMISSIONER OF THE STATE OF LOUISIANA, *Respondents.*

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY,
Petitioner,

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT BANKS

This brief is filed on behalf of respondents, Bank of New Orleans and Trust Company, Bank of Louisiana in New Orleans and Guaranty Bank and Trust

Company of Lafayette, Louisiana, in response to the briefs filed in Nos. 26 and 30 on behalf of petioners, the Comptroller of the Currency and Whitney National Bank in Jefferson Parish.

QUESTIONS PRESENTED

Respondents submit that the fundamental questions here to be decided have not been fairly or accurately presented to the Court by petitioners' briefs. Consequently, in accordance with the provisions of Rule 40 of the Supreme Court Rules, respondents restate the basic questions raised by these cases as follows:

1. Whether the Court of Appeals correctly held that Whitney National Bank of New Orleans—which is the largest bank by far in Louisiana and one of the largest in the entire South and which is, *by stipulation of all parties hereto, admittedly absolutely prohibited by Section 36c of the National Bank Act from opening any banking offices in Jefferson Parish, Louisiana*[1] —is likewise precluded from *purposefully evading and nullifying* Section 36c by the mere device of creating its own *synthetic holding company,* through which it might funnel its *own funds* to open and operate banking offices at the same prohibited location.

2. Whether the Court of Appeals correctly held that the Comptroller of the Currency has no authority arbitrarily and capriciously to sponsor and attempt to license an intentional evasion of the National Bank Act, which he is charged to administer and uphold, solely because he personally thinks the end desirable and because he thinks the artificial corporate maneuvering involved to be impervious to attack.

---

[1] See Solicitor General's brief, pgs. 3, 4; petitioner Whitney's brief, p. 4.

3. Whether the District Court correctly ruled that passage of the Louisiana State Bank Holding Company Act, Act 275 of the 1962 Legislature, was within the power reserved to the States under Title 12 U.S.C. § 1846, the Federal Bank Holding Company Act; and, that Section 3(5) of the said Louisiana statute constitutionally prohibited petitioner Whitney National Bank in Jefferson Parish, *a wholly owned subsidiary of a Louisiana-incorporated bank holding company,* from opening for business.

4. Whether the Court of Appeals and the District Court correctly held that respondent banks, faced with proposed invasion of property rights and serious injury and damage from the proposed unlawful issuance by the Comptroller of a Certificate of Authority to petitioner Whitney-Jefferson, had standing to sue the Comptroller in this suit to test the legality of his proposed action under the National Bank Act (Title 12 U.S.C. §§ 27, 36c).

RESPONDENTS' COUNTER-STATEMENT OF THE CASE

Introduction

It will be a disastrous day indeed for the American banking industry, for the dual banking system historically preserved by the banking laws of the United States, and for respondent banks in the case at bar if this Court should ever accept at face value many of the alleged factual statements contained in petitioners' briefs; or if the Court should adopt, as the law of this nation, the principal legal arguments advanced therein by petitioners. Petitioners' briefs have attempted to create an atmosphere wherein this Court might somehow be led to believe that the Federal Bank Holding Company Act was passed by Congress to promote, fos-

ter and advance monopolistic bank holding company operations and to furnish bankers, bent on evading and circumventing the branching prohibitions of Section 36(c) of the National Bank Act, with a ready-made vehicle or device for so doing. As demonstrated later in this brief, the exact opposite is true. The Federal Bank Holding Company Act is a *penal statute* (12 U.S.C. § 1847), designed to *regulate* and *control* the operations of bank holding companies; and it was passed by Congress in such form that *it expressly reserved to the States their right to continue to prohibit, within their own borders, holding company attempts to evade and circumvent the prohibitions of branching statutes through mere corporate forms or maneuvers* (12 U.S.C. §§ 1842(d), 1846). The Chairman of the House Banking and Currency Committee described the purpose of the Federal Bank Holding Company Act as follows, when (as floor manager) he presented the Bill to the House (Cong. Record, 84th Cong., 1st Sess., p. 8021):

> "The holding company was organized for the purpose of circumventing the banking law. The banking law in the 1920's generally did not permit any branches. There were no branches of national banks before 1927. Through the bank holding company device they circumvented the branch banking laws and accomplished something the branch banking laws had attempted to prevent . . . We are now trying to rectify that condition."

Petitioners' briefs have also attempted to create the impression that "bank holding company devices" have been "frequently established" by metropolitan banks in Louisiana and elsewhere, and had thus already made a mockery of Section 36(c) of the National Bank Act

before this case arose. Again, this is *not* true. The record herein shows, for example, that Whitney's synthetic holding company proposal was the *only bank holding company of any kind* known to be in existence or even proposed in Louisiana (R. 357). That State, until now, has been wholly free of these so-called "twentieth century banking operations," as they are described by petitioner Whitney in its brief.

Moreover, while petitioners would have this Court believe that the sole purpose and effect of the Whitney holding company device would be to let Whitney harmlessly follow its customers into the New Orleans suburbs, the *actual* purpose and effect is quite differently described by Governor Robertson of the Federal Reserve Board and the Louisiana State Bank Commissioner in the Record before this Court. In the words of Governor Robertson (R. 109, 110):

> "The establishment of additional banks and branches always contributes, in some measure, to the convenience of the banking public, and also, in many cases, to the vigor of banking competition. *In this case, however, banking offices affiliated with the largest financial institution in the area would be competing with small local banks, including a bank that opened for business only two months ago in the same shopping center in which it is proposed to locate one of the offices of Whitney Jefferson. The effect of the entry of Whitney Jefferson at this time could be significantly detrimental to this new bank and to another small bank with which Whitney Jefferson would directly compete.*" (Italics supplied).

And, in the vernacular of the complaint filed herein by the Bank Commissioner of Louisiana (R. 355-357):

> ". . . the issuance by defendant of any certificate authorizing Whitney National Bank of New

Orleans, through the device of the Whitney Holding Corporation, unlawfully to establish banking offices in Jefferson Parish, Louisiana, with funds taken directly from the Whitney National Bank of New Orleans, *would cause chaos in the entire banking industry throughout the State of Louisiana, and would, contrary to the public policy of Louisiana expressed in Act 275 of 1962 and underlying L.R.S. 6:54, eliminate all effective protections historically fostered by the laws of the United States and the State of Louisiana for the growth of independent unit banks and to insure effective competition among all banking institutions. . . .*

"More specifically, with reference to Jefferson Parish, Louisiana, the granting of a certificate to intervening defendant herein would bring to bear upon all of the State banks located therein a new destructive, unlawful competition from the combined capital resources, lending power and management of the Whitney National Bank of New Orleans, and would place in jeopardy the capital investments in said banks.

"By law, the State chartered banks located in Jefferson Parish are prohibited from opening and operating branch banks in Orleans Parish, Louisiana, in competition with Whitney National Bank of New Orleans, and each is prohibited by law from creating, establishing and operating with its own capital resources, a holding company system controlling bank offices in Orleans Parish or elsewhere in the State of Louisiana.

"The State chartered banks located in Orleans Parish, Louisiana are relatively small competitors of the Whitney National Bank of New Orleans. Many of the depositors and borrowers of each of these banks either reside in or have offices located in Jefferson Parish, Louisiana, but nevertheless maintain substantial deposits or loan ac-

counts at the banking offices of such banks. Each of these banks is prohibited by law from expanding into Jefferson Parish by means of the establishment of branch facilities or by the device of creating a holding company through which it may simply siphon its capital funds into banking offices in Jefferson Parish or in other locations in Louisiana. *If the intervening defendant were licensed to open its facilities in Jefferson Parish, Louisiana, in contravention of these same statutory prohibitions, said defendant and Whitney National Bank of New Orleans would immediately be able to divest and appropriate to themselves substantial portions of the banking business and profits now enjoyed by the said Orleans Parish State banks from sources in Jefferson Parish, and would cause these State banks to suffer severe, irreparable damage and loss. . . .*" (Italics supplied).

Petitioners apparently were not satisfied to restrict their briefs to oblique factual statements and to upside down contentions with reference to the substantive law of this case. The brief filed on behalf of the Comptroller of the Currency, for example, goes even further and seeks to apply the same type of reasoning to the jurisdictional and procedural elements of this case. In the Court of Appeals, of course, the Comptroller of the Currency specifically instructed the Department of Justice "*not* to press the *lack of standing* argument, as he desired a ruling on the merits," and the attorney representing him there so advised the Court of Appeals (see Court of Appeals decision, R. 465). In fact, Comptroller Saxon himself appeared before the House Banking and Currency Committee in May, 1963, *while this case was awaiting argument in the Court of Appeals*, and as part of his testimony during that Committee's review of the Fed-

eral and State Banking Laws including the question of whether the right of State banks to sue the Comptroller in cases of this kind was being denied, unqualifiedly advised the Committee as follows at page 447 of the hearing record:

> "Previous to my becoming Comptroller it had been the practice of the Department of Justice attorneys representing this office to assert the defense of lack of standing to sue. This practice was followed in preparing the papers filed in suits which were commenced against the office after I had assumed office. *I did not have any personal knowledge that this defense, which was one of several contained in the pleadings, was being asserted on my behalf. It has always been, and still is, my personal feeling that any action of mine should be open to review in a proper court of competent jurisdiction by a bank or individual who feels that a legal error was committed by our office. . . .*
>
> "In the *Whitney* litigation, the defense of lack of standing was contained in the printed briefs. *However, I requested the Department of Justice to inform the Court of Appeals that it was my personal wish that the case be decided on its merits. The Department of Justice representing me so advised the court at the argument last Friday.*
>
> "I regret any possible confusion which may have ensued in the minds of some because of my lack of direct information as to the technical defenses contained in the pleadings in law suits involving the office. . . ." (Italics supplied).

But now, here in this Court, the Comptroller has dredged up a vast array of specious "standing arguments," and in the process has spent approximately

20 pages of his brief attempting to support same without the benefit of any substantial legal authority. Respondents can only surmise that the Comptroller has suddenly lost his appetite for any further decisions on the merits in this case, and has thus reverted to the defense of "confusion" to which he himself referred in his testimony before the Congress.

We shall, of course, return to this matter of "standing" later in this brief. For the present, however, we submit that the correct rule was firmly established in *Wayne Oakland Bank* v. *Gidney, Comptroller of the Currency,* CCA 6, 1958, 252 F.2d 537, cert. denied, 358 U.S. 838, and *Wisconsin Bankers Association* v. *Federal Home Loan Bank Board;* 190 F. Supp. 90, 94 (U.S.D.C., D.C., 1960, affd. 294 F.2d 714, cert. denied, 368 U.S. 938). The rule was stated in the *Wayne* case at page 544, as follows:

> "As to the standing of the Wayne Oakland Bank to maintain its suit, it was faced with invasion of property rights, and injury from a competition that was prohibited by the federal statutes subjecting national banks to the same rules of law as cover the state banks. . . . Whether the rights of a party are infringed by unlawful action of an individual or by the exertion of unauthorized federal administrative power, it is entitled to have such controversy adjudicated."

In the light of this brief introduction, we shall now set forth an accurate counter-statement of the facts of this case (*drawn almost exclusively from exhibits and testimony filed by petitioners themselves before the District Court*).

THE FACTS

The Whitney National Bank of New Orleans is the largest bank by far in the State of Louisiana (Comp. Ex. 5, R. 99). It is one of the largest financial institutions in the entire southern portion of the United States (Comp. Ex. 5, R. 99; 275). For approximately 80 years, Whitney has operated its banking offices and facilities wholly within the City of New Orleans, Parish of Orleans, Louisiana (the City and Parish having the same boundaries). Through these operations, *admittedly and concededly still properly and constitutionally restricted by a long-standing combination of Federal and Louisiana statutory law to the limits of Orleans Parish*, Whitney has grown to a position of banking dominance where it possesses (R. 275)—[2]

approximately	$500,000,000.	—in resources
approximately	$ 13,835,000.	—in undivided profits
approximately	$ 27,200,000.	—in its surplus account
approximately	39%	—of the total deposits in *all* banks in Orleans Parish
approximately	44%	—of all deposits of individuals, partnerships and corporations in the Parish.

[2] In this connection, it is interesting to note by way of comparison, that the unlawful banking proposal, approved by the Comptroller of the Currency but enjoined by this Court in *U.S. v. Philadelphia National Bank*, 374 U.S. 321 (1963), was deemed violative of the Clayton Act, because, *after the merger there involved, the resulting bank* would control "*at least 30%* of the commercial banking business in the . . . Philadelphia metropolitan area." This Court stated, at page 364: "Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, *we are clear that 30% presents that threat.*" (Italics supplied). Here, Whitney controls approximately 40% or more.

Contrary to the competitive picture sought to be conveyed by petitioners in their briefs, Whitney National Bank today, as in the past, continues to maintain this position of dominance. It controls and possesses more deposit and loan business than the second and third largest New Orleans banks combined (R. 275). It also possesses at its offices in New Orleans deposits of individuals, partnerships and corporations emanating from the East bank of the Mississippi River in Jefferson Parish (i.e., *beyond the limits of Orleans Parish*) in an aggregate amount exceeding 30% of such deposits enjoyed by *all banks*, state and national, having thtir head offices in the same area of Jefferson Parish (R. 276). In the record before this Court, Governor Robertson of the Federal Reserve Board formally describes the concentration of banking resources possessed by Whitney National Bank as (R. 111)—

> " . . . a centralization of banking power of major proportions in individual hands, to a degree that, to my knowledge, is without parallel in the American banking system."

As indicated above, both petitioners (the Comptroller and Whitney) consistently and openly conceded, before both the District Court and the Court of Appeals, that Whitney National Bank of New Orleans remains today, as it has been in the past, *constitutionally and lawfully prohibited by a combination of Federal and Louisiana law* from opening banking offices beyond the limits of Orleans Parish. This stipulation is found again, at page 3 of the Solicitor General's brief now before this Court, as follows:

> "However, State law (La. R.S. 6:54) prohibits banks from opening branch offices in parishes other than their home parish and these geographi-

cal limitations are made applicable to national banks by the Banking Act of 1933 (12 U.S.C. 36)."[3]

Substantially, the same stipulation is found in petitioner Whitney's brief, at page 4, including footnote 3, where it is stated:

> "As a national bank, Whitney-New Orleans is prevented from establishing branches outside Orleans Parish by 12 U.S.C. § 36(c), which provides that national banks may establish branches only within the geographic limits imposed by state law on state banks. . . . State banks in New Orleans with capital of more than $100,000 are prohibited by 6 La. Rev. Stat. §§ 54 and 328 from establishing branches outside Orleans Parish."

Nevertheless, Whitney-New Orleans was still exceedingly desirous of opening branch facilities in Jefferson Parish, and elsewhere in Louisiana, beyond the limits of New Orleans (R. 276; 64). It carefully studied all of the means whereby it might possibly avoid, circumvent and evade the prohibitions of the aforesaid combination of federal and state law (R. 276). It specifically considered and firmly rejected the possibility of an "*affiliate arrangement,*" such as was involved in *Camden Trust Company* v. *Gidney, Comptroller of the Currency,* 112 U.S. App. D.C. 197, 301 F.2d 521, cert. denied 369 U.S. 886 (1962), a case resolved by a sharply divided opinion of the same Court

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[3] In *United States* v. *Philadelphia National Bank, supra,* this Court recognized the validity and substance of these prohibitions, by stating, at page 325: ". . . but branching, which is controlled largely by state law—and prohibited altogether by some States—enables a bank to extend itself only to state lines and often not that far."

of Appeals which later declared the Whitney holding company device to be in circumvention and violation of Section 36c of the National Bank Act.[4] With regard to Whitney's rejection of a Camden-type "*affiliate arrangement*," the President of Whitney-New Orleans, in testimony presented as an exhibit in this case by the Comptroller, put it this way (Comp. Ex. 4, R. 74):

> "If branch banking were permited in Jefferson Parish, I wouldn't be here because it would be much simpler to have it by way of a branch. . . . But that is not possible. We see no signs of it coming about by legislative action . . . and our problem has been—*we have been unwilling to go with an affiliate which we couldn't hold onto necessarily.*
>
> *"It (an affiliate) doesn't become a part of our organization; it is just sort of hanging loosely. You have these conflicts of interest and it is awkward.*

---

[4] The so-called "*affiliate arrangement*," referred to at page 4 of the Solicitor General's brief, at page 5 of the Whitney brief in connection with the National Bank of Commerce, and as described in the *Camden Trust Company* case, *supra*, arises when *some* of the individual stockholders of one bank go out and raise *new, fresh capital*, which they themselves then individually invest to purchase stock in a second bank. That arrangement, wholly unlike the Whitney holding company device, *does not* involve the creation of a *synthetic* holding company by the first bank; it *does not* involve *common, continuing management and control of the two banks by one holding corporation;* it *does not* involve the investment of the *original bank's funds* in the stock of the second bank; and the so-called "*affiliate status*" abruptly ends whenever one or more of the substantial stockholders involved sells or disposes of stock in one or both banks. Also, in an "*affiliate*" situation, the two banks often compete with each other for the same business, which would never be true in the Whitney proposal.

> *"The thing that makes this (the holding company approach) interesting to us is the ability to approach the branch phase of it. . . ."* (Italics supplied).[5]

As indicated by that testimony, Whitney-New Orleans finally decided to try a "holding company approach," admittedly as a means of circumventing the Federal and State statutory prohibitions. In this particular connection, the President of Whitney-New Orleans also was shown to have testified in an exhibit offered in this case by the Comptroller (Comp. Ex. 4, R. 64, 65):

> "Under present laws in our state, the Whitney is not permitted to establish branches outside the Parish of Orleans.
>
> "There is a rapidly growing industrial area in adjoining Jefferson Parish up river from Orleans, . . .
>
> "The management of the Whitney National Bank has been studying and weighing alternative methods of ent[illegible]ng Jefferson Parish . . . and to participate in the further growth of that area. . . .

---

[5] It is interesting to note that while petitioner Whitney, at pages 32-34 of its brief, arduously maneuvers to try to side step and explain away the very candid testimony given by the President of Whitney-New Orleans in this matter, the Solicitor General actually continues to adopt and rely on it, at page 4 of his brief. After explaining that Whitney had no interest in an "affiliate arrangement" and decided to adopt a holding company device to enter Jefferson Parish, the Solicitor General, *relying on Mr. Berry's testimony*, frankly states that this decision was made: "In order to assure a continuity of relationship between the new and the old bank, and to avoid any conflict of interest in transactions between the banks . . ."

"The officers of the Whitney National Bank determined in 1960 that the holding company was the proper solution, provided we could put the ownership of the present Whitney National Bank of New Orleans stock into such a company *and, by the use of Whitney assets, establish a bank in Jefferson Parish, which would likewise be fully owned by the holding company.*" (Italics supplied).

A very surprising and unusual aspect of the case in the Courts below was the open, sworn admission by the Comptroller of the Currency that his office and top officials therein (*including the Comptroller himself*) had actually met with the President of Whitney-New Orleans for the purpose of furnishing *advance*, private advice and guidance from the very outset as to how the Federal and State branching prohibitions might be circumvented and evaded (R. 42, 43). The Comptroller, in a sworn affidavit, stated (R. 42, 43):

". . . the Whitney National wished to explore with the Comptroller whatever . . . means were available for . . . expansion into this growing area. . . . The formation of an affiliate bank was discussed and the formation of a holding company was also discussed. The bank management felt that a holding company which would own 100% of the stock of both the old bank and the new bank would be preferable to the formation of an affiliate of which the controlling stock would be held by the same persons who control Whitney-New Orleans, but which, in view of the wide stock distribution of Whitney-New Orleans, would invariably have a minority of stockholders who did not own stock in both banks. The existence of the minority stock interest in each bank, which did not hold corresponding shares in the other, was considered by the Whitney management to be an

undesirable situation because it could conceivably hamper the most efficient and effective day-to-day operation of the two banks. Since the same group would be managing both banks, it was thought that situations could arise in which it would be impossible for the interests of two different groups of minority stockholders to be fully protected. *For this reason, the Whitney management . . . elected to use a holding company for the purpose of establishing a . . . bank in Jefferson Parish.*

"At all times the applicable Louisiana statutes forbidding the establishment of branch offices across parish lines were fully considered. . . ." (Italics supplied).

Having obtained this private, favorable, off-the-record nod from the Comptroller of the Currency before even proceeding with Whitney's plan to circumvent the Federal and State branching prohibitions, the President of Whitney-New Orleans was thus able to make the following bold assertions when he later appeared before the Federal Reserve Board (Comp. Ex. 4, R. 65, 66):

"The Comptroller of the Currency has concurred in a program which has the effect of putting the ownership of the present Whitney National Bank stock into the Whitney Holding Corporation, through this Crescent City National Bank that was mentioned, *and to the establishment of the Whitney National Bank in Jefferson Parish with funds from the present Whitney National Bank, the stock of which would be also owned by the holding company. . . .*

"The Comptroller has already concurred in the acts required to consummate the first step and granted preliminary approval of an application

for charter for the Whitney National Bank in Jefferson Parish. . . .

> "We understand that he has advised you that these charters will be issued if and when the Federal Reserve Board approves this application for a holding company, which will own the stock of the present Whitney National Bank of New Orleans and the stock of Whitney National Bank of Jefferson Parish."

This private advance approval by the Comptroller also caused the Whitney National Bank of New Orleans speedily to embark upon its plan for the circumvention of the statutes, and to set into motion a series of intricate corporate maneuvers, *the sole purpose* being to accomplish indirectly and by evasion that which was admittedly unlawful for it to accomplish directly, i.e., Whitney's expansion into Jefferson Parish (R. 278, 279). Although complicated in execution, these corporate maneuvers were simply designed to draw funds from the Whitney National Bank of New Orleans, with which to establish totally controlled banking offices and facilities in Jefferson Parish and later elsewhere in Louisiana:

First: With $350,000. of its capital funds, Whitney National Bank of New Orleans created Whitney Holding Corporation, *a corporation organized under the laws of Louisiana.*

Second: Solely with the $350,000. contributed by Whitney-New Orleans, Whitney Holding Corporation organized a so-called *"phantom bank"* named Crescent City National Bank, (Crescent), to which the Comptroller of the Currency agreed to issue a national bank charter, *knowing full well that Crescent would exist*

in name only, and would never engage in the banking business.[6]

Third: Whitney New Orleans and Crescent, which latter entity never actually operated for an instant as a national bank (and Whitney Holding Corporation), entered into a consolidation or merger agreement, merging Whitney New Orleans into Crescent. The name of the merged bank was then immediately changed back to Whitney National Bank of New Orleans.

Fourth: Whitney National Bank of New Orleans shareholders surrendered their stock for cancellation, and accepted in exchange Whitney Holding Corporation shares, dissenting stockholders, if any, being eliminated by the purchase of their shares under provisions

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[6] A Federal Officer's issuance of a national bank charter to a non-existent bank, knowing well it was never intended to be opened and operated as a national bank and that its sole purpose was to eliminate dissenting stockholders of Whitney National Bank of New Orleans who did not want to participate in the evasion of federal and state laws (there were 12,145 dissenting shares out of approximately 100,000 voting on the matter), was perhaps the second most bizarre aspect of the case below. This maneuver caused a member of the Federal Reserve Board to state (R. 110): "In order to *eliminate minority stockholders* of Whitney National Bank of New Orleans *and thereby to* insure that Whitney Holding Corporation will be able to elect all members of the bank's board of directors, the plan before the Board includes a so-called '*phantom bank*' *merger*, which makes it impossible for a [dissenting] stockholder to retain his stock interest therein. The purpose of centralizing control of the holding company and its banks in the hands of very few individuals—perhaps only one individual—is apparent from other features of the proposal."

of the National Banking Act.[7] Thus, Whitney Holding Corporation thereupon owned 100% of the stock of Whtiney National Bank of New Orleans, and the shareholders of Whitney National Bank of New Orleans owned 100% of the stock of Whitney Holding Corporation.

Fifth: Whitney National Bank of New Orleans then provided $650,000 of its capital funds to Whitney Holding Corporation "with which Whitney Holding Corporation was to cause to be created the Whitney National Bank in Jefferson Parish, receiving all of its (the Jefferson Bank's) stock therefor".[8]

The President of Whitney-New Orleans candidly and succinctly summarized the end result of these corporate maneuvers for the Federal Reserve Board, in an exhibit offered in this action by the Comptroller as follows (Comp. Ex., 4 R. 68):

> "The Whitney National Bank of New Orleans will continue in exactly the same form as it is now except for the withdrawal of $650,000 in capital funds which will be put into the Jefferson Parish unit as capital for it."[9]

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[7] The Court should note that holders of 12,145 shares out of 100,000 actually voted against the entire device. In fact, dissenting stockholders of Whitney New Orleans even appeared before the Federal Reserve Board to protest federal recognition of the illegal circumvention of the statutes (R. 83-88).

[8] In order to enable the Court to obtain more quickly a complete analysis of these corporate maneuvers in their entirety, respondents respectfully direct the Court's attention to the charts which appear in the Record (pgs. 281-284).

[9] It is again interesting to note that the Solicitor General, at *page 6* of his brief, again adopts the exact substance of the words employed by the President of Whitney-New Orleans to de-

When the time arrived for Whitney-New Orleans to obtain support from its stockholders for these corporate proposals, its President, Mr. Berry, sent them a notice and, contrary to the oblique protestations contained in petitioners' briefs now before this Court, advised them quite bluntly in writing as follows (R. 31, 32):

> "... It is important to bear in mind that under the plan all authorized shares of the Whitney Holding Corporation will be distributed to you, the stockholders of the Whitney National Bank, in exchange for your presently held stock. *You will then own the same proportionate interest as you now have in the Whitney National Bank in all the assets of the holding corporation, which obviously includes all of the assets of the present Whitney National Bank. Control of the Holding Corporation management will rest . . . with the holders of a majority of the stock. . . .*
>
> "We are firmly convinced, after careful consideration of the alternatives, *that your common ownership of all of Whitney National Bank of New Orleans stock and all of the stock of a Whitney National Bank in Jefferson Parish by a holding company to be owned by you is the soundest method of pooling all of the deposits of our customers and of our capital funds* for their use and for the development of this community. From the depositors' point of view, those in the smaller bank will be assured *of the same management* which directs the larger one without possibility of interruption. *They will be assured of access to*

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scribe the "*end result*" of these corporate manipulations. The Solicitor General states: "The *net result* would be to establish a holding company, owned by the original stockholders of Whitney-New Orleans, which would in turn own both Whitney-New Orleans and Whitney-Jefferson."

the large loan limits of the combined banks. They will have the security which arises out of the fact that the large and the small bank have identical ownership as well as management. . . .

"Under the *holding company approach*, the relationship is *completely owned by the stockholders of the holding company*, who will be *all* the present stockholders of the Whitney National Bank and their successors.

"By reason of the common ownership of the two banks in a holding company there can arise no conflict of interest between them as there can between *affiliated banks.*[10] There will be no minority stockholders to be affected.

"From the customer point of view, there will be no conflict of interest arising out of the manner in which the customer sees fit to divide his business *between the commonly owned banks in the two parishes. He will have the full benefits of a relationship with the large bank and its officers.*

"Because of the *permanent relationship* between the large and the smaller bank, the smaller one can operate safely with a smaller capitalization. . . .

"Finally, this holding company group broadens banking possibilities for the future from the point of view of our shareholders. . . . It will give metropolitan New Orleans the soundest form of banking unit *which can accumulate and pool banking resources in this community where they can be used to greatest advantage in the further development of the entire area.*" (Italics supplied.)

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[10] The Court's attention is directed again to the repeated rejections by Whitney-New Orleans, on the ground of alleged "conflict of interest" possibilities, of an "*affiliate arrangement*", such as the one involved in *Camden Trust Company* v. *Gidney*, *supra*.

After it was created by Whitney National Bank of New Orleans under the corporation laws of the State of Louisiana, Whitney Holding Corporation made application to the Federal Reserve Board *solely* for the purpose of gaining that Board's approval, under the provisions of 12 U.S.C. § 1842 (The Federal Bank Holding Company Act), of its proposed acquisition of all of the shares of the aforementioned "phantom", Crescent City, and Whitney National Bank in Jefferson Parish. In accordance with the requirements of 12 U.S.C. § 1842(b), the Board notified the Comptroller of the Currency of the application and sought his views (R. 286). Having personally assisted in the formulation of the plan and having already annointed it with his private blessing, the Comptroller, in three short paragraphs of a letter to the Board, promptly gave his unqualified written approval (R. 166, 167; 286). The Comptroller failed even to mention or comment upon the legality or illegality of the proposal under Section 36 of the National Bank Act (R. 166, 167).

In fact, the Comptroller apparently led the attorney for Whitney-New Orleans to feel it was appropriate for him orally to represent to the Federal Reserve Board that the Comptroller's only concern in the matter was that he wanted to be assured Whitney would be permitted to go ahead "with the meat of the program, which was moving into Jefferson Parish"; and that the Comptroller fully "approved the . . . bank in Jefferson Parish as a desirable banking feature." (R. 93, 94).

Petitioners' briefs seemingly might lead this Court to believe that respondents missed all sorts of oppor-

tunities to oppose the Whitney proposals at public hearings before the Comptroller and the Federal Reserve Board. The truth is more than just the opposite. *First of all, the Comptroller of the Currency, who was solely responsible for the licensing of the proposals under the National Bank Act, never held any hearings at all.* Under the procedures of his office, all actions taken were *ex parte* and private. *Secondly, under the provisions of the Federal Bank Holding Company Act (12 U.S.C. § 1842), when the Comptroller registers his approval of an acquisition proposal pending before the Board, that action obviates the necessity for the statutory public hearing otherwise required.* Thus, in the case at bar, the Comptroller's letter of approval caused the Board to dispense with the statutory public hearing in Louisiana. It did, however, conduct a conference proceeding at its headquarters in Washington, where it accepted "views and comments" on the application (R. 62). None of the respondents were personally served with any notice of this proceeding, the only official notice thereof apparently being published in the Federal Register.

However, when the Board did elect to accept a presentation of views on the Whitney application, dissenting stockholders of Whitney-New Orleans itself appeared and vehemently protested the illegality of the entire proposal under both Federal and State law (R. 75-90). One of these stockholders referred to Whitney's holding company device as a mere "*mythical corporation*" (R. 79), while the attorney for the remaining minority stockholders called it "merely a figment" (R. 86); an "evasion" (R. 87); a "scheme" (R. 87). The attorney for Whitney's own minority

stockholders concluded his presentation before the Board as follows (R. 88):

> ". . . I don't think that this Board has ever approved such a legal maneuver and I don't think that it is within the realm, nor was it contemplated by the acts of Congress that this type of legal maneuver should be permitted and sanctioned by this Board to do what? To permit Whitney National Bank to do indirectly that which they cannot do directly. And I don't think that you gentlemen should lend yourselves to permit them to do indirectly that which the law directly prohibits them from doing."

These contentions by Whitney's stockholders caused the Federal Reserve Board, on its own motion, to write a letter to the Comptroller of the Currency advising him that serious charges had been made that Whitney's proposals "were in violation or circumvention of existing law" (R. 423-425). The Board then stated in its letter to the Comptroller (R. 425):

> "In view of the bearing that these matters might have on the Board's decision on Whitney Holding Corporation's application, the Board would appreciate any comments that you may have. . . ."

The Comptroller, however, refused to comment on any of these matters (R. 425, 426). Instead, he replied as follows (R. 426):

> "Other comments with respect to the legality and merits of the holding company are matters on which a previous Comptroller of the Currency has expressed himself; *therefore, further enlargement on the subject is deemed undesirable.*" (Italics supplied).

But, the record is barren of any expressions to the Board by any Comptroller of the Currency, past or present, regarding the "legality and merits of the holding company" device here involved (see R. 166). The fatal effect of the Comptroller's strange refusal to supply such information or comments to the Board is patent when it is fully understood that the Board declines even to consider or rule on such matters itself, absent advice from the Comptroller (R. 168, 286, 287). *The Board took the position in this very case that all matters "relating largely to an alleged violation of provisions of the National Bank Act" are for the Comptroller, not the Board* (R. 168, 286, 287).

Thus, when the Board rendered a decision on May 3, 1962 approving the application of Whitney Holding Corporation to proceed to acquire the shares in Crescent and Whitney Jefferson, it did so without even referring to 12 U.S.C. § 36(c), 12 U.S.C. § 1846 or the Louisiana law prohibiting branching by national and state banks beyond parish lines, or the effect these statutes might have had upon its decision (R. 287). In fact, having received an unqualified green light from Comptroller Saxon, the Board candidly admitted it was authorizing Whitney-New Orleans, through a holding company device, to evade the prohibitions otherwise imposed upon it by the law (R. 99, 100). The Board accordingly ruled (R. 99, 100, 101):

> "Under the law of Louisiana, a bank may not establish branches outside of the parish in which its head office is situated. . . . The boundaries of Orleans Parish are conterminous (sic) with the boundaries of the City of New Orleans, and consequently banks situated in New Orleans (including

national banks) may not establish branches beyond the city limits. . . .

". . . In accordance with the requirement of section 3(b) of the Act, the Comptroller of the Currency was asked to submit his views and recommendations with respect to the pending application. In a letter dated October 11, 1961, Comptroller . . . recommended approval . . .

"The stated purpose of the proposed holding company system is to enable an organization centered about Whitney New Orleans to provide banking services not only through its existing 12 offices within the City of New Orleans but also through offices in the East Bank of Jefferson Parish. The holding company system will be under the direction of the present executive management of Whitney, New Orleans; in fact, for present purposes, the holding company itself is simply the means by which Whitney banking offices may be established and operated in East Bank. Consequently, the character of the management and the prospect of the Applicant (Whitney Holding) and its two proposed subsidiary banks *may be evaluated largely on the basis of the financial history and condition, character of management, and prospects of Whitney New Orleans.*

"The financial history of Whitney New Orleans has been satisfactory. The condition of that bank is sound and its management is regarded as satisfactory. Accordingly, it is believed that the management of Applicant and Whitney Jefferson will be satisfactory and the prospects of the holding company, which *depend principally upon the prospects of Whitney New Orleans, are favorable.*" (Italics supplied).

This bald endorsement by the federal government under these circumstances of a device admittedly de-

signed flagrantly to circumvent and violate both Federal and State law was a bit too much for Governor Robertson of the Federal Reserve Board. In a dissenting opinion, he stated (Comp. Ex. 5, R. 109-111):

> "Whitney National Bank of New Orleans is the largest banking institution of the City of New Orleans and the State of Louisiana. It controls in the neighborhood of 40% of the deposit and loan business of all New Orleans banks—more than the second and third largest banks combined. *The proposal before the Board of Governors would place control of this bank in Whitney Holding Corporation and thereby would overcome the effect of the branch banking laws of Louisiana, which prevent Whitney from establishing any offices outside of . . . the City of New Orleans. In other words, by this means the Whitney banking organization would escape the legal limitations that now permit it to have offices only within the City of New Orleans.*
>
> "In my judgment, one of the basic purposes of the Bank Holding Company Act—to prevent undue concentration of banking power in holding companies—would be unjustifiably defeated by approval of the creation of a holding company system to control the predominant bank of a major metropolitan area and additional banks within that area. . . ."

Governor Robertson then went on to conclude (R. 111):

> "In brief, the plan before the Board seems designed to minimize the participation of stockholders, and even of directors, in the control and management of the holding company and its subsidiary banks. . . . *Taken together, these features . . . reflect an arrangement by which power to direct*

and control the holding company system, including its banks, could be concentrated in the hands of a single individual. . . . It should not receive this Board's stamp of approval.

"The proposal before the Board would provide a vehicle for enhancing the existing high degree of banking concentration in the area and would permit a centralization of banking power of major proportions in individual hands, to a degree that, to my knowledge, is without parallel in the American banking system. For these reasons, I conclude that the creation of the proposed holding company system would be contrary to the public interest, and therefore should be denied." (Italics supplied).

In the face of this decision by the Federal Reserve Board, the State Bank Commissioner of Louisiana immediately sought an opinion from the Attorney General of Louisiana as to whether Whitney's holding company device was lawful (R. 289). The Attorney General issued the following written opinion, in substance (R. 163, 164, 289):

"There is a general principle of law that corporate entities must be disregarded where they are made the implements for avoiding a clear legislative purpose. To allow the establishment of a bank holding company to avoid and circumvent the branch banking laws of our State is, in our opinion, prohibited, if not by the letter, by the spirit of our law. . . .

"It is the opinion of this office, therefore, that a bank holding company may not circumvent the branch bank laws of our State by the acquisition of a controlling interest in a subsidiary which is located in a parish other than the domicile of the parent company."

The Louisiana State Bank Commissioner thereupon sent a copy of this opinion by the Attorney General to the Federal Reserve Board (R. 165). He requested a rehearing (R. 165). Other of the respondents herein also petitioned for reconsideration (R. 167). *The Board refused to reconsider the matter, stating that the questions raised "relate largely to an alleged violation of provisions of the National Bank Act, which is administered by the Comptroller of the Currency"* (R. 168).

The Board's decision granting Whitney Holding Corporation's application was subject to judicial review, upon the filing of a petition in the Fifth Circuit Court of Appeals *within 60 days after May 3, 1962* (12 U.S.C. § 1848) (R. 288). Upon such review, the Court of Appeals would have jurisdiction under 12 U.S.C. 1848—

> "to affirm, set aside, or modify the order of the Board and to require the Board to take such action with regard to the matter under review as the Court deems proper."

However, before any petition for review could be prepared and filed and before the action of the Federal Reserve Board could become final under 12 U.S.C. 1848 or under the Regulations of the Federal Reserve Board itself, Comptroller of the Currency Saxon, on May 18, 1962 (*just 15 days after the Federal Reserve Board acted*) announced that he had already considered and approved Whitney's program and had directed that same proceed to completition "on or after May 24, 1962" (*just 21 days after the Federal Reserve Board acted*) (R. 34). By June 20, 1962 (*also before the 60-day appeal period prescribed by 12 U.S.C. 1848 had expired*) Comptroller Saxon was further proclaiming that *absent the granting of an in-*

junction by the District Court in the case below, he would consider it his "duty . . . to issue a Certificate of Authority to Whitney Jefferson. . . ." (R. 47, 289).

Accordingly, the Complaint for Declaratory Judgment and Injunction herein was filed on June 9, 1962 (R. 6). The action was grounded on 12 U.S.C. §§ 27, 36, 1841 and 1846, and prayed for an injunction enjoining the Comptroller of the Currency from issuing a certificate under 12 U.S.C. § 27 licensing the commencement of Whitney's unlawful banking operations in Jefferson Parish, Louisiana. The Comptroller, upon being advised of the filing, voluntarily agreed to withhold issuance of his Certificate of Authority to Whitney-Jefferson until the Motion for Preliminary Injunction herein could be heard and determined (R. 289). Two of the respondents herein also thereupon timely filed in the Fifth Circuit a petition to review the ruling of the Federal Reserve Board which approved the holding company application under 12 U.S.C. § 1842 (b) (*Bank of New Orleans and Trust Company, et ano.* v. *Board of Governors of the Federal Reserve System,* No. 19, 788, CCA 5).[11]

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[11] On October 7, 1963, after receiving extensive briefs and hearing oral argument by all parties, including the Government and Whitney Holding Corporation, the Fifth Circuit entered the following Order:

> "In view of the decision of the Court of Appeals of the District of Columbia in *Whitney Nat'l Bank in Jefferson Parish* v. *Bank of New Orleans and Trust Company,* Nos. 17,672 and 17,681, August 14, 1963, decision in the present case will be withheld pending determination in the District of Columbia case of the application for rehearing and any subsequent proceedings involving application for a writ of certiorari."

On December 11, 1963, the Fifth Circuit denied Whitney's motion to vacate that ruling.

It seems important at this point to digress for a moment to correct some glaring inaccuracies which unfortunately appear in petitioners' briefs before this Court. In his brief, the Solicitor General states, at page 10, that "By May 25, 1962 (i.e., *before this action was commenced*) Whitney-Jefferson was organized as a national bank under the terms of the National Bank Act . . .", and that Whitney-Jefferson was wholly ready "to commence the business of banking." In its brief, Whitney baldly states, at page 8, that on the date this action was commenced: "Whitney-Jefferson was prepared to open its doors for business. . . ." All of these statements are incorrect, as the sworn Record herein clearly shows. *First*, on May 25, 1962, Whitney-Jefferson was a mere "body corporate" under the terms of the National Bank Act (12 U.S.C. § 24). It could not become a "national bank" until the Comptroller issued a Certificate of Authority as provided in that Act (12 U.S.C. § 27). No such Certificate had been issued by June 9, 1962, when this action was commenced. And, of course, the very purpose of this action was to enjoin the Comptroller from issuing a Certificate which would license Whitney to commence the business of banking in Jefferson Parish, in violation and evasion of the National Bank Act itself.

Secondly, Whitney-Jefferson had *no* door to open for business in Jefferson Parish on June 9, 1962, the date this action was commenced; and indeed, it had *not yet* subscribed to and paid for capital stock of the Federal Reserve Bank of Atlanta, as alleged by the Solicitor General's brief (p. 10). On the contrary, *after this action was commenced* on June 9 and solely for the purpose of putting Whitney-Jefferson and the Comptroller in a position where they might urge that

some substantial "damage" would be sustained if a preliminary injunction should issue, Whitney-Jefferson frantically took the following steps (*as taken from the sworn affidavit of its own President*), (R. 390, 391).

> 1. "*On June 15, 1962,* Whitney Jefferson subscribed for three hundred sixty (360) shares of $100.00 par value stock of the Federal Reserve Bank of Atlanta, Georgia, and paid the necessary portion of the subscription price as required by the Federal Reserve Act, namely $18,000.00."
>
> 2. "During the period June 4-8, 1962, Whitney-Jefferson commenced negotiations for a *temporary site* for its banking operations with the owner of the premises 4407 Jefferson Highway. On *June 13, 1962,* Whitney-Jefferson instructed and authorized the real estate agent negotiating the lease on behalf of Whitney-Jefferson to enter into a formal lease agreement on its behalf, *which lease was executed and effective June 15, 1962.*"
>
> 3. "Whitney-Jefferson *finally* acquired its proposed permanent site, 4408 Jefferson Highway, on *June 29, 1962.*" (Italics supplied).

The so-called "*temporary site*", rented by the $500,000,000 Whitney organization on June 15, 1962 as aforesaid to give some credence to its contention before the Courts that it was ready to open for business, turned out to be as late as July 3, 1962, a rather dilapidated "Washateria" (R. 193-195). A photograph of the said "temporary site", *taken on July 3, 1962, (almost a month after this action was commenced)*, appears in the Record at page 195, and as Appendix A to this brief. The so-called "permanent site", on July 3, 1962 was found to be "The Royal Tourist Court" (R. 193-200); and photographs of this facility are also in the Record and Appendix hereto.

As stated above, when this action was initially filed, the Comptroller agreed voluntarily to withhold the issuance of his Certificate until the Motion for Preliminary Injunction could be argued. Thereafter, and without any fault of respondents contributing thereto, petitioner Saxon suddenly refused to continue voluntarily to withhold same (R. 174, 175; 178-182). The parties accordingly appeared before the District Court, and after a hearing, Judge Hart granted a Temporary Restraining Order directing the Comptroller to withhold his Certificate until the Motion for Preliminary Injunction could be heard (R. 176-177).

The Motion for Preliminary Injunction came on to be heard on July 6, 1962 before Judge Holtzoff (R. 225-273). During these proceedings Judge Holtzoff stated it seemed clear "that what the Whitney National Bank was doing was trying to establish what in essence, though not in form, was a branch bank." (R. 257). The Court stated further "if this device is legal, then you might as well repeal Section 36(c)" (R. 260). The Court was also advised by counsel for petitioners that Louisiana was then considering remedial emergency legislation, which would become law "on Monday" (3 days hence) and which would clearly prevent a Louisiana bank holding company and its subsidiaries from opening for business a bank not yet open (R. 264). The Court replied that it was "not going to rush the matter in order to prevent an action on the part of Louisiana or any other state legislature" (R. 264). The Court thereupon granted a preliminary injunction (R. 272, 273).

As indicated, since late May, 1962, the State of Louisiana, never before confronted with the monopolistic plague of bank holding company operations, but now

confronted with a sudden, totally unexpected, arbitrary administrative approval of what was considered a brazen attempt by the largest bank in the State to circumvent and evade the prohibitions of both Federal and State branching statutes merely through the device of a holding company intermediary, had been considering, in its House and Senate, emergency legislation authorized to the States by the reservation contained in the Federal Bank Holding Company Act, 12 U.S.C. § 1846. This legislation Act 275 of 1962, was passed by the House on June 27, 1962 by a vote of 80 to 16 (R. 333, 334). It passed in the Senate on July 4, 1962, and was signed into law on July 10, 1962, *the same day on which the Preliminary Injunction herein was signed by the District Court* (R. 295, 296, 221). This Act, at Section 3(5) and as here pertinent, provided:

> "It shall be unlawful . . . (5) for any bank holding company or subsidiary thereof to open for business any bank not now opened for business. . ."

As stated above, all parties thereupon moved for summary judgment. It was stipulated and agreed that "the issue of the alleged violation of Louisiana Act 275 of 1962 is to be treated in all respects as raised in the pleadings herein" (R. 384, 385). In other words, the parties agreed in writing that the Court should determine whether Act 275 of 1962 effectively precluded the issuance of a Certificate to Whitney-Jefferson, in addition to the question of whether the issuance of a Certificate was likewise precluded by the original Section 36(c) issues raised by the pleadings. Petitioners thereupon attacked Act 275 of 1962 as unconstitutional. The Louisiana State Bank Commissioner then moved to intervene (R. 346, 347). All

parties consented to his intervention (R. 385). The District Court thus granted his motion and added him as a plaintiff (R. 385, 386).

After extensive briefing and oral argument of the motions for summary judgment, the District Court (Judge McLaughlin) thereupon granted respondents' cross-motions (R. 435-438). The Court ruled, in substance, that (a) the Comptroller of the Currency had no discretion to issue a Certificate under 12 U.S.C. § 27 to license an operation prohibited by law; (b) Act 275 of 1962 was constitutional and authorized to Louisiana by 12 U.S.C. § 1846; and (c) Act 275 rendered unlawful Whitney's proposed operations in Jefferson Parish, and thus the Comptroller was to be permanently enjoined from chartering same under 12 U.S.C. § 27. Judge McLaughlin went on to state (R. 438):

> "The Court having upheld the constitutionality of Louisiana Act 275 in its application to defendant making it unlawful for said defendant to open in Louisiana, the Court deems it unnecessary to address itself to the cogent arguments put forth by counsel on the question of the applicability of 12 U.S.C. 36(c) as to whether, by its terms, it proscribes in these circumstances, the setting up of the type of bank herein involved and secondly, if not proscribed by the terms of the statute, whether this Court ought to look behind the corporate form of the new bank to determine whether or not it is in violation of Section 36(c)."[12]

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[12] The District Court nevertheless made detailed Findings of Fact in support of its Judgment, and these clearly included all of the essential undisputed facts necessary to support a ruling on the Section 36(c) issues (R. 445-448). The Court's attention is directed particularly to Findings 7, 8 and 17 (R. 446, 448).

Petitioners both appealed (R. 452, 453). The Court of Appeals, consisting of Circuit Judges Miller, Washington and Danaher, affirmed the judgment of the District Court, holding, in substance, at 323 F.2d 290:

> "Consequently, we pierce the corporate veil which shrouds this intricate transaction, and see Whitney-New Orleans attempting to establish a branch in Jefferson Parish in violation of 12 U.S.C. § 36(c). It is a bootstrap operation by which Whitney-New Orleans, using its own funds in corporate maneuvering, seeks to establish a branch in prohibited territory. . . .
>
> "We think it clear that the opening of Whitney-Jefferson is prohibited by 12 U.S.C. § 36 and that consequently, the Comptroller was properly enjoined from issuing a Certificate of Authority for it to begin business. . . ."

Both the Comptroller and Whitney petitioned for rehearing *en banc*. These petitions were unanimously denied on October 17, 1963.[13] The petitions for a writ of certiorari ensued.

These clearly establish the utter fallaciousness of the position taken by petitioner Whitney, at page 31, et seq. of its brief, to the effect that the District Court made no findings of fact upon which the Court of Appeals could later ground its opinion under Section 36c of the National Bank Act.

[13] Two Judges abstained.

SUMMARY OF ARGUMENT

I

It is settled law that the Comptroller of the Currency has no discretion under the National Bank Act (12 U.S.C. 27) to issue a Certificate of Authority to license a banking operation prohibited by law, and if he attempts to do so, the Courts will enjoin him (*Wayne Oakland Bank* v. *Gidney*, 252 F. 2d 537, *cert. denied* 358 U.S. 838; *Commercial State Bank* v. *Gidney*, 174 F. Supp. 770, affd. 278 F. 2d 871; *Union Savings Bank* v. *Saxon*, D.C. App. No. 18,145, 1964). 12 U.S.C. 27 itself proscribes the issuance of a Certificate until it can be shown the banking corporation involved "is lawfully entitled to commence the business of banking"; and it provides that the same shall be withheld whenever it appears that the shareholders of the proposed banking facilities "have formed . . . for any other than the legitimate objects contemplated" by the National Bank Act.

In the case at bar, both petitioners *unequivocally concede* that Whitney National Bank of New Orleans is absolutely prohibited by the National Bank Act (12 U.S.C. 36c) from opening *any* branches or offices outside of Orleans Parish. Petitioners also concede that the *sole purpose* of the synthetic holding company device established by Whitney New Orleans and the proposed Jefferson Parish banking operation was and is to *defeat* and *evade* the said prohibitions of 12 U.S.C. 36c. In cases of this nature, this Court and others in the Federal system have historically ruled that when corporate forms or devices are created and used solely for the purpose of evading or frustrating a statutory prohibition, such devices must be disregarded in order

to preserve and uphold the law (*Northern Securities Company* v. *United States*, 193 U.S. 197; *Metropolitan Holding Co.* v. *Snyder*, 79 F. 2d 263; *Corker* v. *Soper*, 53 F. 2d 190). That rule has been applied particularly whenever a holding company device has been organized to defeat the National Bank Act.

Consequently, for all of the reasons discussed in Point I of this brief, the decision of the Court of Appeals herein was eminently correct and fully supported by the Record, *which consists almost entirely of exhibits submitted and testimony given by petitioners herein.* That decision was based on the *"realities"* of this case, and of course, under the law, mere differences in *"form"* do not salvage corporate devices established to evade the law. Furthermore, the Whitney plan not only evades Section 36c of the National Bank Act. It also violates the sense of 12 U.S.C. 1845, which was passed by Congress to prevent bank funds from being siphoned off to finance holding company operations.

The fundamental and fatal weakness which runs through petitioners' briefs is their blind refusal to recognize, as the Court of Appeals did, the essential differences which exist from the very outset between (a) a *bona fide* bank holding company established by investors *to invest its own capital funds* in the stocks of different banks, and (b) the Whitney-type synthetic holding company, *established by a bank itself, solely and admittedly as a "device" and for the purpose of using that bank's funds alone to open banking offices at a place prohibited by Sections 36(c), (f) of the National Bank Act.* When this distinction is clearly understood, it becomes evident that the decision of the Court of

Appeals must be affirmed if the branching prohibitions of the National Bank Act are to be sustained at all.

The Court of Appeals properly rendered summary judgment. All parties cross-moved for that relief and all formally stipulated before the District Court that there was no genuine issue regarding any of the material facts involved. Thus, petitioner Whitney, never contended until this case reached the Supreme Court that it was "inappropriate" for the Court of Appeals to have decided this case on summary judgment, and this Court therefore is without jurisdiction to consider such a belated contention (*Bloeth* v. *New York*, 82 S. Ct. 661, 662 (1962)). In any event, the sole ground asserted in support of this contention is that the testimony of Mr. Berry, then and still the President of Whitney New Orleans and Whitney Holding, *filed herein by petitioner Comptroller,* should not be taken at face value and petitioner Whitney should thus be given a chance to rebut this testimony by its own organizer. No such bizarre contention should be entertained by this Court (*Atlas* v. *Eastern Airlines, Inc.*, 311 F. 2d 156, 162, *cert. denied*, 373 U.S. 904); and it is of course, interesting to note that the Solicitor General does not seriously join in this contention.

II

Petitioners would apparently have this Court rule that Congress has historically sought to foster *Whitney-type* holding company devices, and has thus consistently voted to leave national banks, desirous of evading the prohibitions of the Nationaal Bank Act, free to adopt such devices, specifically as a means for defeating the law. The Congressional policy has been exactly *opposite.*

As early as 1911, one of the large New York national banks, almost exactly like Whitney-New Orleans in this case, created a holding company device through which it might evade and defeat the branching prohibitions and other restrictions of the National Bank Act. The President of the United States requested an opinion as to the legality of this maneuver. The Solicitor General and Attorney General of the United States, *relying on decisions of this Court,* rendered a written opinion, holding, as the Court of Appeals did in this case, that the "device" was "in usurpation of Federal authority and in violation of Federal law." In 1932, the Chairman of the Senate Banking and Currency Committee, during the Senate debate on the Bank Act of 1933, inserted this Opinion in the Record, stating that it correctly stated the rules of law which should be applied to strike down corporate devices created to evade and defeat the National Bank Act.

All of the Congressional proceedings supporting the bank Act of 1933 and the Bank Holding Company Act of 1956 were to the same effect. It is thus clear that the Court of Appeals' decision herein actually supports and gives great force and effect to a policy Congress has espoused for approximately 35 years.

III

The licensing of Whitney's proposed operation in Jefferson Parish was correctly enjoined not only because it constituted a clear-cut attempt to evade and defeat the prohibitions of section 36c of the National Bank Act, but also because it is directly and expressly prohibited by Section 3(5) of the Louisiana Bank Holding Company Act, as authorized by the "Reservation of States Rights" contained in the Federal Bank Hold-

ing Company Act, 12 U.S.C. 1846 (*Braeburn Securities Corp.* v. *Smith*, 15 Ill. 2d 55, 153 N.E. 2d 806 (1958), *appeal dismissed by this Court for want of a substantial federal question*, 359 U.S. 311).

By so ruling in *Braeburn*, this Court simply reaffirmed that national banks, which are istrumentalities of the Federal Government and subject to the paramount authority of the United States, are nevertheless subject to State laws and prohibitions *whenever Congress so provides* (*Mercantile Nat. Bank of Dallas* v. *Langdeau*, 371 U.S. 555, 559 (1963)).

Moreover, Congress itself went as far as it possibly could in the Federal Bank Holding Company Act to make it clear that the States were to retain the right to prohibit or severely regulate, within their respective borders, bank holding companies and their operation or control of both national and state bank subsidiaries (18 U.S.C. 1841(c), (d); 1842(d); 1846). Thus, the District Court's decision herein is likewise absolutely correct, and we submit it too should be upheld by this Court.

Finally, there is no merit whatsoever to petitioner Whitney's claim that Louisiana Act 275 violates the Fourteenth Amendment (*Stone* v. *Mississippi*, 101 U.S. 814; *Douglas* v. *Kentucky*, 168 U.S. 488; *Ferguson* v. *Skrupa*, 372 U.S. 726 (1963)).

IV

The District Court and Court of Appeals both found, on the basis of the facts here involved, that respondent banks had standing to sue, and that they would suffer a legal wrong if the Comptroller were permitted to license an unlawful competition, prohibited by a com-

bination of both Federal and State law (*Wayne Oakland Bank* v. *Gidney*, 252 F. 2d 537, *cert. denied*, 358 U.S. 830; *Wisconsin Bankers Association* v. *Robertson*, 190 F. Supp. 90, 94, affd. 294 F. 2d 714, *cert. denied*, 368 U.S. 938, rehearing denied, 368 U.S. 979; *Commercial State Bank* v. *Gidney*, 174 F. Supp. 770, affd. 301 F. 2d 521). Any denial of such standing would clearly deprive respondents of their property and statutory rights without due process of law and would leave the Comptroller of the Currency in a position where his decisions, in violation of the very statute he administers, would be without remedy and beyond the scope of judicial review. This would be in violation of the rules established by this Court in *Frost* v. *Corporation Commission*, 278 U.S. 515 and *Stark* v. *Wickard*, 321 U.S. 288.

When the District Court found that respondent banks had standing to sue, there could no longer be any question regarding its jurisdiction or the right of respondent banks to judicial review under the Administrative Procedure Act, 5 U.S.C. §§ 1001, 1009, (*Stark* v. *Wickard*, *supra*, *Wisconsin Bankers Assn.* v. *Robertson*, *supra*). Finally, respondents have no adequate remedy at law to prevent or rectify the Comptroller's proposed unlawful action. The Comptroller admits that there is "*no* provision for an administrative hearing and *no* authorization for competitors to appear before the Comptroller" to contest his *ultra vires* actions —"his decisions are made *ex parte*." And, he concedes that Congress *has not provided, in the National Bank Act or in any other statute, for any other mode of judicial review of his decisions.* What an excellent opportunity for the creation and maintenance of a capricious autocracy, without any due process of law, if this Court should rule, as the Comptroller contends,

that there should be *no* "forum where competitors could protect an alleged right to be free of *unauthorized competition*", whenever he proposes to license same!

The absolute importance of a decision by this Court affirming the Court of Appeals on the standing to sue and jurisdictional aspects of this case lies also in the fact that, once the Comptroller is permitted to issue his Certificate, *respondent banks would have no remedy whatsoever (Commercial State Bank* v. *Gidney, supra)*. If the right to maintain this suit were taken from respondents, the illegal operation would be licensed forthwith, vast irreparable damage would be done, the branching restrictions of the National Bank Act would no longer be sustainable, the prohibitions of the bank holding company statutes would be defeated, and equity, contrary to its most basic maxim, would have suffered a wrong to be without a remedy.

Finally, this suit in no respect represents a collateral attack on a decision of the Federal Reserve Board, made under *a different statute and in a case involving entirely different matters and parties.* Petitioners both concede that *separate approval actions* of *two* federal agencies were necessary before the Whitney program could be put into effect. The *first, required by the National Bank Act standing alone,* involved *exclusively Whitney Jefferson's right to open and commence the business of banking* (12 U.S.C. 21-27); *and that entire process was under the sole jurisdiction of the Comptroller.* The *second, required by the separate Federal Bank Holding Company Act standing alone,* involved *exclusively the right of Whitney Holding Corporation to become a holding company and to acquire the stock in the two Whitney banks. That pro-*

cedure was under the sole jurisdiction of the Federal Reserve Board.

Hence, these two *separate* administrative proceedings involved (1) completely different matters and objects, (2) different applicants and applications, and (3) entirely different and separate determinations—i.e., (a) the lawfulness of the licensing by the Comptroller of Whitney Jefferson's proposed banking operation, and (b) the legality of the proposed stock acquisitions by the holding company, same to be decided exclusively by the Board.

Congress therefore quite naturally prescribed *completely different and independent administrative proceedings* to be pursued by the parties, one under the National Bank Act (12 U.S.C. 21-27), the other under the Holding Company Act (12 U.S.C. 1842)—and judicial review of the Comptroller's decision in the former in no respect enjoins or modifies the Board's decision in the latter— and vice versa, under 12 U.S.C. 1848. In fact, the Comptroller himself has made it quite clear on the Record here (R. 310), *that unless he is enjoined in the instant action,* he intends immediately to license the opening of Whitney Jefferson, irrespective of the fact that judicial review of the Board's decision under 12 U.S.C. 1848 is wholly incomplete and still pending in the Fifth Circuit—and of course, respondents are powerless to obtain an injunction against the Comptroller or Whitney Jefferson in the Fifth Circuit, because neither are even Parties there.

ARGUMENT

I

The Court of Appeals Correctly Enjoined the Comptroller of the Currency From Licensing, Under 12 U.S.C. § 27, a Proposed Banking Operation Admittedly Conceived, Designed and Proposed Solely for the Purpose of Evading, Defeating and Violating the Prohibitions of the National Bank Act (12 U.S.C. § 36c)

It is settled law that the Comptroller of the Currency has no discretion under the National Bank Act (12 U.S.C. § 27) to issue a Certificate of Authority to license a banking operation prohibited by law, and if he attempts to do so, the Courts will enjoin him (*Wayne Oakland Bank* v. *Gidney*, 252 F. 2d 537 (CCA 6, 1958), cert. denied 358 U.S. 838; *Camden Trust Company* v. *Gidney*, 301 F. 2d 521, 522 (ftn. 4, 5, D.C. App. 1962), cert. denied 369 U.S. 886; *Commercial State Bank* v. *Gidney*, 174 F. Supp. 770, affd. 278 F. 2d 871 (D.C. App. 1961); *Union Savings Bank of Patchoque* v. *Saxon*, D.C. App. 1964, No. 18,145. Title 12 U.S.C. § 27 itself proscribes the issuance of a Certificate of Authority until it can be shown that the banking corporation involved "is lawfully entitled to commence . . . . business"; and that section expressly provides for the withholding of a Certificate whenever it appears that the shareholders of the proposed banking facilities "*have formed same for any other than the legitimate objects contemplated*" by the National Bank Act.

In the case at bar, both petitioners *unequivocally concede* that Whitney National Bank of New Orleans is absolutely prohibited by the National Bank Act (12 U.S.C. § 36c) from opening *any* branches or banking offices or facilities outside of Orleans Parish, Louisiana. 12 U.S.C. § 36(f) actually defines the term "*branch*" to be all-inclusive, as follows:

> "The term *'branch'* as used in this section shall be held to include any branch bank, branch office, branch *agency, additional office,* or *any branch place of business* located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent." (Italics supplied).

Petitioners also concede that the *sole purpose* of the synthetic holding company established by Whitney New Orleans and the proposed Jefferson Parish banking operation now before this Court was and is *to defeat* and *evade* the said branching prohibitions of Section 36(c) of the National Bank Act (Whitney brief, p. 4, 5; Comp. brief, p. 3, 4). These concessions, on their face, establish beyond peradventure that the proposed Jefferson Parish operation was intentionally created for *"other than the legitimate objects contemplated"* by the National Bank Act, and accordingly, the issuance of a Certificate is necessarily precluded by the language of 12 U.S.C. § 27 itself.

Furthermore, in cases of this nature, the Federal Courts, with this Court in the vanguard, have historically ruled that when corporate forms or devices, including a holding company, are created and used solely for the purpose of evading, circumventing or frustrating a statutory prohibition or to defeat public or legislative policy, such devices must be disregarded in order to preserve and uphold the law (*Northern Securities Company* v. *United States,* 193 U.S. 197; *United States* v. *Lehigh Valley R. Co.,* 220 U.S. 257; *United States* v. *Reading Company,* 253 U.S. 26; *Schenley Distillers Corp.* v. *United States,* 326 U.S. 432; *Metropolitan Holding Co.* v. *Snyder,* 79 F. 2d 263 (CCA 8, 1935); *Corker* v. *Soper,* 53 F. 2d 190 (CCA 5, 1931),

cert. denied 285 U.S. 540 (1932); *Alabama Power Company* v. *Federal Power Commission*, 94 F. 2d 601 (D.C. App.); *Francis O. Day, Inc.* v. *Shapiro*, 267 F. 2d 669 (D.C. App.); *Fitzpatrick* v. *Commonwealth Oil Co.*, 285 F. 2d 726, 730 (CCA 5); *Corn Products Refining Company* v. *Benson*, 232 F. 2d 554, 565 (CCA 2)). In *Fletcher Cyclopedia Corporations* (1963 Rev. Ed.), Vol. 1, Ch. 2, § 45, pp. 240, 241, the rule is stated as follows:

> "Where the corporate form of organization is adopted or a corporate entity is asserted in an endeavor to evade a statute or to modify its intent, courts will disregard the corporation or its entity and look at the substance and reality of the matter."

Indeed, since the *early* 1930's the Circuit Courts *have consistently ruled, in cases involving the banking industry, that whenever officers, directors or shareholders of a national bank create a holding company or some other similar corporate device, specifically for the purpose of evading or defeating a provision of the National Bank Act, the holding company veil must be pierced or ignored in order to sustain the law* (*Metropolitan Holding Co.* v. *Snyder*, *supra*; *Corker* v. *Soper*, *supra*, in which case certiorari was denied by this Court). *In the Metropolitan Holding Company* case, the Eighth Circuit ruled in 1935 at 79 F. 2d 263, 266, 267:

> ". . . the courts will not countenance the interposition of a mere corporate shadow to conceal who are the actual and beneficial owners of bank shares. To permit individuals to circumvent . . . this statute by simply organizing a corporation for the purpose of holding shares would set up a device against which the statute would ever afterwards be ineffective . . . ."

The decision in *First National Bank of Billings* v. *First Bank Stock Corporation*, 306 F. 2d 937 (CCA 9, 1963), relied on by petitioners herein, is not contrary to the basic rule adopted by the other circuits and applied by the District of Columbia Court of Appeals in the case at bar. In fact, in its decision in *Billings*, the Ninth Circuit specifically stated, at page 942:

> ". . . We do not agree with appellees that the fact that the two banks are separate corporate organizations demonstrates conclusively that one is *not* the branch of the other. In the banking field, as elsewhere, courts have the power to 'pierce the corporate veil' when the realities require it."

Consequently, we submit that the decision of the Court of Appeals in the instant action was eminently correct, and that it must be affirmed by this Court if Section 36(c) of the National Bank Act is to survive the combined assaults of monopoly-minded bankers and Comptrollers of the Currency who are preoccupied with its administrative repeal rather than its enforcement.[14]

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[14] The Record shows that the Comptroller helped devise the plan enjoined by the Court of Appeals (R. 42, 43). It shows also that Comptroller Saxon, formerly an attorney for one of the largest national banks in the United States, has repeatedly announced his opposition to Section 36(c) and his desire to see it rescinded (R. 35, 36). Furthermore, the decision of this Court in *U.S.* v. *Philadelphia National Bank*, *supra*, shows that while the Attorney General, FDIC and the Federal Reserve Board unanimously rejected the merger, which this Court later found to be in violation of the antitrust laws, the Comptroller nevertheless approved it and sought to put it into operation. The very same procedure was followed by the Comptroller in *United States* v. *First National Bank and Trust Company of Lexington*, 84 S. Ct. 1033 (1964), in the face of unanimous opposition from the other three federal agencies involved.

Contrary to petitioners' contentions that the Court of Appeals decision was "unfounded," "myopic," "irrelevant," "unsupported by the record" and "improperly made," that Court carefully considered all of the exhibits and evidence in the record *(which, by the way, consisted almost exclusively of petitioners' own testimony and exhibits)* and concluded (R. 470):

> "If Whitney-Jefferson, in its *organization, management* and *operation*, would be to all intents and purposes a branch of Whitney-New Orleans forbidden by 12 U.S.C. 36(c), the authority of the District Court to enjoin him (the Comptroller) from issuing a Certificate of Authority is quite clear."

The Court of Appeals then went on laboriously to find, *from the written statements and testimony of the President of Whitney New Orleans himself* (R. 470, 471):

> "There was actually no pretense about the matter: Whitney of New Orleans frankly proposed to evade the statutes by establishing through the holding company arrangement an office in East Jefferson Parish which it would manage and control. Its president said on October 27, 1961, in his communication to Whitney-New Orleans stockholders which explained in detail the plan of reorganization:
>
> 'The *basic purpose* of the program is to allow the Whitney organization in New Orleans to commence a Holding Company operation controlling a bank in East Jefferson Parish to protect Whitney's competitive position in that area . . . .'
>
> "On October 28, 1961, he wrote to his stockholders:
>
> '. . . From the depositors [sic] point of view, those in the smaller bank will be assured of the

same management which directs the larger one without possibility of interruption. They will be assured of access to *the large loan limits of the combined banks.* They will have the security which arises out of the fact that *the large and the small bank have identical ownership as well as management.*

'From the customer point of view there will be no conflict of interest arising out of the manner in which the customer sees fit to divide his business between the commonly owned banks in the two parishes. *He will have the full benefits of a relationship with the large bank and its officers.*

'Because of the *permanent relationship* between the large and the smaller bank, the smaller one can operate safely with a smaller capitalization.'

"This is a very good description of a branch banking operation .... The *nature* of the arrangement, and *not the label applied to it,* determines the character of the relationship between two banking institutions. In 12 U.S.C. § 36(f) Congress gave a broad meaning to the word 'branch' ...."

The Court of Appeals, referring to still other statements and actions taken by Whitney New Orleans and its President, stated further in its decision, at R. 475:

"The facts already recited sufficiently show, we think, that Whitney-New Orleans intends to do business through Whitney-Jefferson in the same way as if the institutions were one. The President of Whitney-New Orleans frankly made this quite clear. We recite some of his statements: *On June 28, 1961, in submitting to the Comptroller applications to organize* Crescent City and Whitney-Jefferson and to consolidate Crescent

City with the original Whitney-New Orleans, Whitney's President said:

> 'These applications form part of an overall plan for the operation in the Parish of Orleans and in the Parish of Jefferson of the Whitney organization in holding company form.'" (Italics supplied).[15]

The Court of Appeals also found from the Record that the "Board of Governors of the Federal Reserve System . . . was under no illusion as to the true nature of the transaction" (R. 472), and the Court stated (R. 476):

> ". . . the Board of Governors . . . said 'The holding company itself is simply *the means* by which Whitney banking offices may be established and operated in East Jefferson Parish.'"

The Court therefore justly and correctly ruled, on the basis of authorities such as those referred to herein above (R. 476):

> "Consequently, we pierce the corporate veil which shrouds this intricate transaction, and see Whitney-New Orleans attempting to establish a branch in Jefferson Parish in violation of 12 U.S.C. §36(c). *It is a bootstrap operation* by which *Whitney-New Orleans, using its own funds in corporate maneuvering, seeks to establish a branch in prohibited territory.* Like Jacob of old, Whitney-New Orleans covered its hands with the Esau-like plan of reorganization and, despite the tell-tale

[15] This statement, referred to by the Court of Appeals in its opinion, was contained in a letter, written by the President of Whitney-New Orleans, *on a letterhead of Whitney-New Orleans*, to the Comptroller, and with this letter he enclosed the original application for leave to organize Whitney Jefferson (R. 380, 381). The letter was signed by Mr. Berry in his capacity as President of Whitney New Orleans (R. 381).

sound of its own voice, obtained the blessing of the Comptroller of the Currency. Unlike Isaac, however, the Comptroller was not gulled by the ruse; *acting ultra vires in the circumstances shown, he knowingly permitted it because he considered the end desirable, and because he thought the corporate maneuvering impervious to attack.* But, when the corporate veil is pierced, it becomes apparent that both voice and hands were those of Whitney-New Orleans." (Italics supplied).

A. The Decision of the Court of Appeals Was Based On the "Realities" of This Case. Mere Differences In "Form" Do Not Salvage Corporate Devices Established to Evade the Law.

Petitioners urge this Court to reject the aforesaid decision of the Court of Appeals on the basis of their contention that, *in form only,* Whitney Jefferson, as a holding company subsidiary, might differ *in some minor respects* from an otherwise normal bank branch.[16] However, the law is firmly settled in cases of this nature that—

"Realities, in short, and *not mere form* must be considered by the courts . . .

"In short, it is the use to which the *corporate form* is put which controls and the facts in the particular case will determine the course of relief."

See *Francis O. Day, Inc.* v. *Shapiro, supra;* 30 C.J.S. 107, p. 513—"Equity regards substance rather than form."

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[16] Whitney's brief states, at page 27: " . . . the *form of organization* chosen by petitioner is determinative so far as the applicability of the branch banking law is concerned."

And, at page 40: "The Court of Appeals' opinion is an exercise in unreality . . . It ignores the real distinctions between these *forms* of organizations . . ."

Stripped of its sophisticated format, petitioner Whitney's brief is found still to contain various admissions which are directly pertinent to the *"realities"* of this case. Although these admissions are dispersed, like rabbits in the forest, they are still capable of definite recognition as follows:

(i) at page 5: "Whitney-New Orleans determined that it, too, should establish a relationship with a bank in Jefferson Parish."

(ii) at pages 5, 6: "Accordingly, Whitney . . . developed a program for the creation of a . . . bank in Jefferson Parish. It would be a separate corporation, *but* through the *vehicle of a holding company . . .*, it would be under the *same ultimate ownership as Whitney New Orleans.*"

(iii) at page 6: "Whitney-New Orleans would pay to Whitney Holding . . . $650,000. Whitney Holding would use these funds to establish . . . Whitney Jefferson."

(iv) at pages 6, 7: "It was, of course, contemplated that . . . Whitney Jefferson would rely substantially on the *management experience* which over the years had inspired the confidence of Whitney-New Orleans' customers."

(v) at page 18: ". . . important benefits do accrue from cooperation between related banks with substantial identity of ownership and management. Establishment of a holding company offers the further advantage of *assuring continuing identity of ownership* . . . . The creation of Whitney-Jefferson reflected a decision in favor of the *holding company approach.*"

(vi) at page 27: "Of course, holding company banking is similar in some practical respects to branch banking . . . ."

(vii) at page 34: "What he (the President of Whitney New Orleans) did . . . was to point out

to the stockholders . . . those benefits of *branch banking* . . . permitted under a bank holding company plan . . ."

(viii) at page 38: "*Control.* The court's second point was that the new bank would be subject to *ultimate management and control by the executives of the metropolitan bank.* Of course it would . . . (T)his is the *most common purpose of establishing a bank holding company.*"

(ix) at page 39: "*Names.* The court's third point is that the name Whitney National Bank in Jefferson Parish is susceptible of confusion with the name Whitney National Bank of New Orleans. . . . In this case, the name of course would suggest, *and was meant to suggest, close connection between the banks and the benefits of experience and reliable management, high integrity and the best banking connections.*"

There are, of course, other even more candid and damaging admissions in the Record before this Court, to which neither petitioner dared to allude. At page 67 of the Record, the President of Whitney New Orleans testified:

"The management of (Whitney Jefferson) will be supplied from the Whitney National Bank of New Orleans. That unit will have the benefit of the training program of the old bank and can select the personnel best adapted to its needs."

And, at page 68 of the Record, Whitney's President testified:

"The Whitney National Bank of New Orleans will continue in exactly the same form as it is now except for the withdrawal of $650,000 *in capital*

funds which will be put into the Jefferson Parish unit as capital for it." [17]

At page 72 of the Record, Whitney's President stated:

> "I think that is one of the most important services a bank renders aside from lending money, discussing the customer's problems with him and helping him arrive at a proper decision, letting him convince the bank management that his plans are correct and are right.
>
> "He would not feel that he had that privilage of coming in *to the larger bank's senior officers unless there were that common ownership of the two banks.*
>
> "With the common ownership, he would have no hesitancy to come over; *he would feel it is all the same general situation.*" (Italics supplied).

The Record also shows that the type of checks proposed to be used by Whitney Jefferson contain in bold, large letters the words "*Whitney National Bank,*" while the words "in Jefferson Parish" are printed in tiny caps (R. 125-131). A specimen of these checks is included in the Appendix to this brief. The same type of printing is proposed for the letterheads of Whitney

[17] At page 36 of its brief, petitioner Whitney states: "Withdrawal of '*capital*' from a national bank 'either in the form of *dividends or otherwise*' is prohibited by law (12 U.S.C. § 56)." While learned counsel for this petitioner now seek to call the $650,000 withdrawal from Whitney a "dividend," the President of Whitney, prior to this suit, frankly described it as a "*withdrawal of capital.*" In either event, we strongly suggest, as we did in the District Court and the Court of Appeals, that this is just another example of the illegality here involved, and that the withdrawal violates not only the National Bank Act, but the intent and purpose of 12 U.S.C. 1845 as well.

Jefferson (R. 128), a specimen of which is also included in the Appendix.

The Record also reflects that the bank furnishings and equipment for Whitney Jefferson were to be taken from the quarters of Whitney New Orleans (R. 382). Finally, when Whitney New Orleans asked certain of its friends to write letters for the record, supporting its proposal to open offices in Jefferson Parish, each wrote substantially or typically as follows (R. 366-371, at 366):

> "Whitney National Bank,
> Main Office,
> New Orleans, Louisiana
>
> ". . . I understand that you are contemplating the establishment of a *branch bank* to be located in the vicinity of Jefferson Highway . . . .
>
> "While I cannot speak for our management at Plymouth, I can definitely state that a *branch of your institution located on Jefferson Highway* would mean a great deal to us . . . .
>
> "I shall continue in my efforts to increase our activity with the Whitney, and your contemplated new office should certainly strengthen your sales effort with our management to secure a greater portion of our New Orleans business . . . ." (Italics supplied).

These, we submit, are unfettered *'realities'* of this case, and taken together with those contained hereinabove in this brief and in the decision of the Court of Appeals, they patently direct that said decision was correct and proper in every respect.

B. Under the "Realities" of this Case, Petitioner Whitney Was Formed to Operate as an Illegal Branch or Additional Office of Whitney New Orleans, and There Are No Provisions of the National Bank Act or of the Federal Bank Holding Company Act Which Require the Rescue of This Illegal Proposal.

It hardly seems appropriate for petitioner Whitney Jefferson to argue, as it does at pages 28, 29 of its brief, that while Whitney New Orleans will enjoy most of the advantages of a branch relationship with it, under the National Bank Act (12 U.S.C. 91, 93), its depositors, in the event of its insolvency, will be able to "look only to Whitney-Jefferson's assets and would have no claim on those of the city bank"; and that its local directors alone "would be liable for a violation by that bank of the National Bank Act." These certainly would not seem to be reasons for this Court "to apply the general principle of equity" referred to at page 56 of Whitney's brief and thus reverse the judgments of the lower courts in the case at bar.

In essence, Whitney has thrown the light on further hidden dangers which are inherently involved in its illegal plan to evade the law. Whitney New Orleans will thus be free to reap all of the benefits of a branch relationship with Whitney Jefferson, but depositors in Whitney Jefferson will have no claim on the $30,000,000. of capital and surplus held by Whitney New Orleans if Whitney Jefferson, capitalized with only $650,000., should become insolvent. And, while Whitney Jefferson admittedly will *"be subject to ultimate management and control by the executives of the metropolitan bank"* (Whitney brief, p. 38), *only Whitney Jefferson's local, "dummy directors" will be liable for violations of the National Bank Act.*

Moreover, petitioner Whitney argues, at pages 27-29 of its brief, that the Court of Appeals "lost sight of

the crucial practical respects" in which the two banks planned to operate when it failed to recognize that "the Federal Bank Holding Company Act (12 U.S.C. 1845) prevents any mingling of funds between a bank holding company and a subsidiary or among subsidiaries." *Indeed, this is simply another totally unlawful aspect of Whitney's plan before this Court,* and the Court of Appeals expressly recognized it when it held (R. 476):

> "It is a bootstrap operation by which Whitney-New Orleans, *using its own funds in corporate maneuvering,* seeks to establish a branch in prohibited territory." (Italics supplied).

In fact, in the Complaint filed in this action by Respondents on June 9, 1962, it is specifically alleged (R. 12, 13):

> "13. Plaintiff's assert that the aforementioned scheme for evasion of federal and state banking laws is not only in direct violation of the letter and intent of Title 12 U.S.C. 36, but it is also in violation of the intent of the following provisions of the Bank Holding Company Act, Title 12 U.S.C. § 1841, et seq.:
>
> (i) Title 12 U.S.C. § 1845, which provides:
>
> '(a) From and after May 9, 1956, it shall be unlawful for a bank—
>
> (1) to invest any of its funds in the capital stock, bonds, debentures, or other obligations of a bank holding company of which it is a subsidiary, or of any other subsidiary of such bank holding company. . . .'"

Consequently, as pointed up by Whitney itself in its brief, the unlawful plan before this Court involves not

only a purposeful evasion of Section 36(c) of the National Bank Act, but also an intentional violation of the purpose of the so-called "*upstream financing prohibitions*" of the Federal Bank Holding Company Act (12 U.S.C. 1845). *The sole funds possessed by the synthetic Whitney Holding Company were drawn "upstream" out of Whitney New Orleans, and this violated the intent of 12 U.S.C. 1845.*

Petitioners also complain that "the Court of Appeals apparently ignored the . . . sworn affidavit (R. 388-91) of Mr. Gilly, the President of Whitney Jefferson, which . . . shows that it was not intended that the two banks be operated as one." On the contrary, we submit that petitioners themselves have elected to ignore the substance of that affidavit, which, although prepared after this action was begun, still supports the decision of the Court of Appeals and shows:

(1) that he, Mr. Gilly, will simultaneously serve as President of Whitney-Jefferson, and as Executive Vice President of Whitney New Orleans (R. 388);

(2) that at least 4 "local directors" of Whitney Jefferson will also simultaneously be "local directors" of Whitney New Orleans (R. 388);[18]

(3) that Whitney Jefferson "will establish correspondent bank relations with the Whitney-New Orleans" (R. 389);

(4) that "the capital and surplus of Whitney-Jefferson is $600,000. and the capital and surplus of

[18] Both boards, of course, will be at all times subject to the "*ultimate management and control*" of the officers and directors of the Holding Corporation, who will be the principle officers and directors of Whitney New Orleans.

Whitney New Orleans is $30,000,000. and because of the loan limit which, in most cases, is 10% of the capital and surplus, *Whitney-Jefferson may in its discretion offer participations in loans to Whitney New Orleans . . .*" (R. 389);

(5) ". . . that Whitney Jefferson proposes to clear through Whitney New Orleans" (R. 389);

(6) that Whitney Jefferson will remit customers' deposits, where requested, to Whitney New Orleans (R. 389); and

(7) that Whitney Jefferson will cash checks drawn on Whitney New Orleans for any of its customers in order to "gain favor with the person cashing the check" (R. 389, 390).

Again, we submit, that the true *'realities'* of this case direct an affirmance of the decision of the Court of Appeals.

C. The Court of Appeals Correctly Distinguished The "Realities" of This Case From Those of the Billings and Camden Decisions.

The brief filed on behalf of the Comptroller no longer makes any attempt to contend that the decision of the Court of Appeals in this case collides with the same Court of Appeals' decision in *Camden Trust Co.* v. *Gidney*, 112 U.S. App. D.C. 197, 301 F. 2d 521 (1962), cert. denied, 369 U.S. 886 or with the decision of the Ninth Circuit in *First National Bank in Billings* v. *First Bank Stock Corp.*, 306 F. 2d 937 (CCA 9, 1962). In fact, the Comptroller readily concedes, at page 61 of his brief, that in *Billings*, the Ninth Circuit held—

> "That there might be circumstances in which a separately chartered bank owned by a bank holding company might be treated as a branch (306 F. 2d at 943)."

Petitioner Whitney, however, continues to berate the Court of Appeals by contending that its decision here cannot be reconciled with either *Camden or Billings;* and that the alleged conflict results exclusively from the District of Columbia Circuit's "misunderstanding of the transactions involved or lack of familiarity with the nature and development of modern banking" (Whitney brief, pg. 36). *But, two of the three judges who concurred in the decision in the case at bar actually constituted the majority of the District of Columbia Circuit in Camden.* They, above all others in the world, were certainly best qualified and equipped to recognize the fundamental differences between the *'realities'* of this case and the *'realities' of Camden*—and indeed, they did just that, and stated (R. 476, 77):

> "Whitney of New Orleans considered the *'affiliate' arrangement* we approved in the *Camden* case, and decided not to use it because it *does not* permit the identity of ownership provided by the holding company device, and because it *does not* assure that even the permitted affiliation will remain constant.
>
> "Quite unlike the sum total of the several factors which led us to approve the *'affiliate'* status in the *Camden Trust* situation, we need observe only that here, *inter alia, the holding company is not providing Whitney Jefferson with new and fresh capital, but with capital supplied by Whitney-New Orlans; the new bank will be managed and controlled by the executives of Whitney-New Orelans; and the name, Whitney National Bank in Jefferson Parish (the last three words in small letters on its checks and other forms), is easily susceptible of confusion with the parent organizer, The Whitney National Bank of New Orleans."*

The Solicitor General's brief, of course, readily concedes, at page 4, that Whitney expressly considered the possibility of the establishment of a *Camden*-type "*affiliate*", but rejected it "in order to assure a continuity of relationship between the new and old bank, and to avoid any conflict of interest in transactions between the banks." The Court's attention is also directed to the testimony of the President of Whitney-New Orleans, at page 71, of the Record, where he states:

> "As we see it, in an affiliate relationship, we have no way of knowing or no way to prevent the stock of the two institutions from drifting apart. It is my understanding that if, in the case of an affiliate, less than 50% of its stock is owned by the stockholders of the other bank—in other words, if the common ownership drops below 50%—supervisory authorities must require that there be no interlocking of officers or directors.
>
> "This could happen in a period of stress and be embarrassing to both banks. . . .
>
> "In an affiliate relationship with different stockholders, there is a constant conflict of interest as between those stockholders in every transaction between the two banks. With interlocking officers and directors, every transaction is open to question as to which bank had the advantage in the transaction.
>
> "*That could be eliminated under the approach we have taken.*" (Italics supplied).

The Court of Appeals was equally correct and clear-cut in its analysis of the vast differences between the holding company system involved in *Billings* and the synthetic holding company established by Whitney

solely for the purpose of evading the law. The Court stated, at R. 474:

> "The *Billings* case is far from being factually on all fours with the present case. There the bank holding company was organized in 1929, and had been operating in that capacity for 30 years. It possessed stock in 87 banks with 94 offices. *Thus, it was not created or organized by a bank, as Whitney Holding was, solely for the purpose of opening a branch office of that bank.* It was the traditionally recognized bank holding company which, *with its own capital,* invests in or buys the stock of banks. *It was not the type of holding company here involved, whose only capital was the money siphoned through it by Whitney-New Orleans to open Whitney Jefferson in a prohibited location.*" (Italics supplied).

The Court of Appeals, therefore, concluded with regard to *Billings* (R. 475):

> "We agree with the Ninth Circuit that the corporate veil should be pierced whenever one bank is 'doing business through the instrumentality of' the other or 'in the same way as if the institutions were one.' 'The unitary type of operation,' said in the *Billings* opinion to be 'characteristic of branch banking,' is present here. In such circumstances, the relation of parent and branch exists, even though the banks are separate corporate organizations."

We suggest that the fundamental and fatal weakness which runs throughout petitioners' briefs before this Court is their blind refusal to recognize, as the Court of Appeals did, the essential differences which exist, from the very outset, between (a) a *bona fide* bank holding company, established by investors to invest *its own capital funds* in the stocks of several different banks, and (b) the Whitney-type, synthetic holding

company, *established by a bank, solely and admittedly as a 'device' and for the purpose of using that bank's funds alone to open a branch at a location prohibited by Section 36(c) of the National Bank Act.*

When this distinction is clearly understood, it becomes evident that the decision of the Court of Appeals herein must be affirmed if the branching prohibitions of the National Bank Act are to be sustained at all.

D. The Court of Appeals Thus Properly Rendered Summary Judgment in Favor of Respondent Banks.

As stated by the Solicitor General, at page 11 of his brief:

> *"The gravamen of the Complaint (herein) was that Whitney-Jefferson was a branch bank within the meaning of the Banking Act of 1933 (12 U.S.C. 36 . . .), and that its establishment was therefore prohibited by law* (R. 6-20)."

Petitioner Whitney likewise admits at page 32 of its brief, that respondent's, from the very beginning of this action, "did allege that Whitney-Jefferson was *in law* a 'branch' and that the *purpose* of the Whitney program was to 'evade' the branch banking laws . . . ."

Whitney, however, now contends *for the very first time before this Court,* that it was "inappropriate for the Court of Appeals to decide such a question on summary judgment" (Whitney brief, p. 33). The sole basis asserted for this contention is that the President of Whitney-New Orleans, Mr. Berry, was thus given "no opportunity to explain" some of his testimony and statements, *which had been filed in this case by petitioners themselves,* and which the Court of Appeals took at face value when it rendered its decision herein. Mr. Berry, of course, is still the President of Whitney-

New Orleans and Whitney Holding Corporation, and he is a banker with more than 25 years of experience as the head of the largest bank in Louisiana. It is inconceivable therefore, that he knew not what he said when he candidly explained why his bank formed the holding company device and how his bank intended to operate it to evade the banking laws.

In any event, this must be the only time in the memory of this Court that any party sought to reverse a decision of a Court of Appeals on the ground that the lower court erred by accepting as true and by taking at face value the petitioner's own prior written statements and formal testimony, and that a trial was required to give the petitioner a chance to rebut its own case. As late as April, 1963, however, this Court did deny certiorari in a case where a similar, *although not as bizarre*, contention was advanced (*Atlas* v. *Eastern Airlines, Inc.*, 311 F. 2d 156, 162 (CCA 1, 1962), *cert. denied*, 373 U.S. 904 (1963). In that case, the First Circuit stated, at page 162:

> "Plaintiff also urges here that the district court erred in granting the motion for summary judgment because the record indicated that the credibility of the affiants . . . was in serious question . . . . Be that as it may, counsel for plaintiff did not seek to raise this question below, nor did he attempt to cross-examine the affiants in this regard . . . . Consequently, he cannot be heard now." [19]

[19] See also *N.L.R.B.* v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 503 (1951), where this Court stated: "It is not for us to invite review by this Court of decisions turning solely on an evaluation of testimony . . . . "; *Bloeth* v. *New York*, 82 S. Ct. 661, 662 (1962), where this Court ruled: "It appears on the face of the present application that the two questions proposed for review were not raised in the Court of Appeals until . . . the motion for reargument. In such circumstances, it is clear that this Court would be without jurisdiction to consider them."

Moreover, until the proceedings before this Court, all parties to this action readily conceded that a decision in this case would necessarily turn *exclusively on questions of law.* On the basis of the very same Record now before this Court (which exceeds 450 printed pages), the Comptroller was the first to move for summary judgment. Cross-motions for the same relief were then promptly filed by respondents and petitioner Whitney. All parties agreed in their motion papers that "there is no genuine issue herein as to any material fact." When these motions came on before the District Court, Judge McLaughlin stated at the very outset (R. 431):

> "The Court will ask counsel on both sides to respond to the question of the Court as to whether there is any substantial question of fact involved in this case, or whether it is *fully agreed* by all that the question to be presented to the Court is strictly a question of law.
>
> "We all know if there is any substantial question of fact that is a bar to the Court proceeding in a motion for summary judgment."

Petitioner Whitney, which now seeks to contend, for the first time after decision of the Court of Appeals, that this case was not ripe for summary judgment, thereupon advised Judge McLaughlin as follows (R. 431, 432):

> "*Mr. Acheson:* Your Honor, I would say as to that, there is no disagreement as to the facts between the intervening defendant and the plaintiffs, if by fact we mean an event, something which occurred and can be reported; if we mean a conclusion which is drawn from that, there are different conclusions. These I submit and we have submitted in papers filed with Your Honor *are mere*

> *conclusions of law, or conclusions to be drawn from undisputed facts. There are no facts as such which are in dispute.* This is my assertion to Your Honor . . . *I know of no event, no specific occasion, nothing which was done upon which there is any difference between us.* (Italics supplied).

The District Court thereupon agreed to hear the motions for summary judgment. It received full oral argument and briefing on the Section 36(c) issue, and while that court found it unnecessary to decide said issue, it made and filed detailed Findings of Fact setting forth a basis for such a decision on appeal if necessary (R. 446). The Court of Appeals then received even more extensive briefing and oral argument from both petitioners and respondents on the Section 36(c) issue, and of course, finally elected to enjoin the statutory evasions involved on the grounds hereinabove recited.

It seems clear, under the facts and circumstances presented, that there could never be a case more fully suited for summary judgment than this one. And, insofar as the effect of Whitney-New Orleans' "*intent*" in this case is concerned, it was settled in *Metropolitan Holding Co.* v. *Snyder, supra,* at page 268, as follows:

> "The incorporators of the holding company may have acted in good faith according to their standard of right, but under the facts of this case, as disclosed by the record, they must be judged by *the legal effect of what they deliberately did.* If . . . the corporation was merely an instrumentality set up for their own convenience in holding title to the shares, *then in equity it matters not what design, good or evil,* prompted their actions; from either source, the effects of their actions—the avoidance of statutory liability—are the same."

II.

THE COURT OF APPEALS' DECISION IS WHOLLY IN ACCORD WITH AND GIVES GREAT FORCE AND EFFECT TO A POLICY CONGRESS HAS BEEN SEEKING TO ACCOMPLISH FOR APPROXIMATELY 35 YEARS.

Petitioners would apparently have this Court believe that Congress has historically and continuously favored Whitney-type bank holding company devices, and has thus consistently voted to leave national banks, anxious to evade the branching restrictions of the National Bank Act, free to adopt such devices specifically as a means for defeating the law (Solicitor General's brief, p. 17; 46-64; Whitney brief, p. 16-27). Petitioners have sought to create this atmosphere by employing out-of-context excerpts from Congressional debates and committee reports; but when these are examined, it becomes clear that *the Congressional policy has been exactly opposite to that alleged by petitioners; and that the Court of Appeals' decision herein is completely in accord with and in support of that federal policy.*

The National Bank Act, as passed in 1864, provided that a national bank could do business only at the "place" or "office" specified in the articles of association.[20] Consequently, the Comptroller of the Currency consistently interpreted the Act as authorizing a national bank to do business in no more than one office, and therefore as prohibiting branch banking for national banks.[21] This Court also adopted that interpretation.[22]

In 1911, one of the large New York national banks, *almost exactly like Whitney-New Orleans in the case*

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[20] R.S. §§ 5134, 5190.

[21] Chapman, "Concentration of Banking," pp. 110-111.

[22] *First National Bank of St. Louis* v. *Missouri*, 263 U.S. 640.

at bar, created a holding company device through which it might evade and defeat the said branching prohibitions as well as other restrictions of the National Bank Act.[23] The President of the United States asked the Attorney General to furnish him with a formal opinion as to the legality of these maneuvers, and the Attorney General, in turn, requested same from the Solicitor General.[24] On November 6, 1911, the Solicitor General issued a written opinion, and the Attorney General concurred therein.[25] Because of its importance to a basic understanding of the Federal policy against the employment by National banks of holding company devices to evade the prohibitions of the National Bank Act, a copy of said opinion has been printed and is contained in the Supplemental Appendix to this brief.

Unlike the Solicitor General's brief in the case at bar, which argues that "the branch-banking restrictions . . . are not applicable to separately chartered banks owned by a holding company," the Solicitor General's Opinion in 1911 ruled that *a holding company device, created by a nationl bank to evade the prohibitions of the National Bank Act, was "in usurpation of Federal authority and in violation of Federal law"* [26] The Solicitor General, like the Court of Appeals in the case at bar, found the prohibitions of the National Bank Act to be "matters of substance," and he stated that they could be *"no more evaded than violated."* [27] *"Indirection,"* he said, *"if it accomplishes the same*

[23] 75 Cong. Record 9899, May 10, 1932.

[24] 75 Cong. Record 9899, May 10, 1932.

[25] 75 Cong. Record 9898, 9899, May 10, 1932.

[26] 75 Cong. Record 9904, May 10, 1932.

[27] 75 Cong. Record 9901, May 10, 1932.

purpose, stands upon the same footing with direction."[28] The Solicitor General thus concluded:[29]

> "We are dealing with corporations of a public character, with national banks, which have public duties to perform, and of these it is a peculiar obligation 'to maintain independent corporate existence and not to surrender control of their affairs or the exercise of their powers to another corporation' . . .
>
> "*Where public law and public policy are involved, forms and fictions are disregarded and the facts are dealt with as facts* . . . ." (Italics supplied).

Such was the state of the law and the federal policy against Whitney-type holding company evasions of the National Bank Act as early as 1911, approximately 53 years ago.

In 1927, Congress passed the McFadden Act, which liberalized the branching restrictions of the National Bank Act to permit national banks to establish branches within those cities in which State banks had the same privilege on the date the Act became effective.[30] In other words, *Congress adopted State law as the measuring rod by which national banks would be permitted to branch*, and in States which denied or restricted branching for State banks, branching was likewise denied or restricted for national banks.[31]

In 1930, shortly after the banking panic of 1929, the Senate authorized its Banking and Currency Commit-

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[28] 75 Cong. Record 9901, May 10, 1932.

[29] 75 Cong. Record 9903, 9904, May 10, 1932.

[30] Sec. 7(c), 44 Stat. 1228.

[31] Senate Report 473, 69th Cong., 1st Sess., p. 8.

tee to study all of the banking systems of the country and to report back as soon as possible.[32] This study was made under the chairmanship of Senator Carter Glass of Virginia. In 1932, the Committee filed its Report.[33] The growth of holding company devices was described as a drastic "*perversion of the national banking and State banking laws,*" and as a major reason why so many "hazardous losses" had occurred.[34] The Committee, however, stated:[35]

> "Since the (holding) companies are State corporations, Congress has no control over them, except that which may be voluntarily granted . . . .
>
> "It is thought that, in any event, holding companies should not be allowed, except in a severely limited way, to vote at elections of Federal Reserve bank directors, since otherwise the Federal Reserve bank would become merely the creature of the holding company . . ."

When the Senate Committee prepared legislative proposals to deal with these conditions, it suggested that national banks be permitted to engage in State-wide branching.[36] On the floor of the Senate, Senator Glass explained the purpose of that proposal as follows:[37]

> "*Mr. Glass:* What we want to do is to break up chain banking, which is an irresponsible species

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[32] 71st Cong., 2d Sess., S. Res. 71.

[33] Senate Report 584, 72d Cong., 1st Sess.

[34] Senate Report 584, 72d Cong., 1st Sess., p. 9.

[35] Senate Report 584, 72d Cong., 1st Sess., p. 10.

[36] Senate Report 584, 72d Cong., 1st Session.

[37] 75 Cong. Record 9893.

of banking, and substitute for it branch banking, which is an entirely responsible species of banking."

Still later in the floor debate on May 10, 1932, Senator Glass advised the Senate that he had fortunately been able to uncover a copy of the Solicitor General's "holding company device" Opinion of November 6, 1911, referred to hereinabove.[38] He stated with reference to said Opinion:[39]

> ". . . it will appear from the language thus used that this was not merely the opinion of the Solicitor General but it was an opinion concurred in by the Attorney General. *Why it was not acted on, why the Comptroller of the Currency, having supervision and control under the law of the national banking system, was not supplied with this opinion for his guidance, why it apparently disappeared from the face of the earth and could only be found in the original form, of which I have been furnished a photostatic copy, is something that I can only conjecture.*
>
> ". . . It ought to have been supplied to the Comptroller of the Currency. *It seems to me that, fortified with an opinion of that sort, the Comptroller of the Currency, . . . was under an obligation to break up these illicit practices and the establishment by national banks of affiliates.*" (Italics supplied).

As the Senate proceeded with its consideration of the Bank Act of 1933, the synthetic Whitney-type "holding company device" was repeatedly referred to as "the instrument of some large bank seeking to build

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[38] 75 Cong. Record 9898.

[39] 75 Cong. Record 9899.

up a branch-banking system which is not permitted by law";[39] as "this Frankenstein in banking;"[41] as an "evasion of the law";[42] as "vicious";[43] as fraught with "the evils of indirect control";[44] as "unscrupulous contributors to the financial catastrophe . . . and mainly responsible for the depression".[45] The result finally was the passage of Section 36(c) of the National Bank Act in substantially its present form. Congress apparently believed, as stated by Senator Glass, that the more liberal branching restrictions of Section 36(c), as amended by the Bratton amendment adopted on the Senate floor, would cause national banks voluntarily to reject the Whitney-type "holding company device", and that the Comptroller of the Currency would henceforth seek to enforce the "rule" of Solicitor General Lehmann's Opinion, which had been disinterred after being mysteriously buried for 21 years.

By 1938, however, President Roosevelt found it necessary to send a special message to the Congress, urging the adoption of legislation "that would effectively control the operation of bank holding companies; prevent holding companies from acquiring control of any more banks, directly or indirectly; prevent banks controlled by holding companies from establishing any more branches; and make it illegal for a holding company to borrow from or sell securities to a bank in which it holds stock."[46] A bill was introduced by

[39] 75 Cong. Record, 9975.

[41] 75 Cong. Record 9984.

[42] Senate Report 584, Part II, p. 2, 72d Cong., 1st Sess.

[43] 76 Cong. Record 1997.

[44] Senate Report 77, 73rd Cong., 1st Sess., p. 10.

[45] 76 Cong. Record 3726.

[46] S. Doc. 173, 75th Cong., 3d Session.

Senators Glass and McAdoo to carry out these recommendations.[47] Similar bills were introduced in the 77th, 79th, 80th, 81st and 83rd Congresses, but were not passed. Finally, in the 84th Congress, the Federal Bank Holding Company Act was enacted into law.[48]

The House Report in support of the said Act states: "Evidence developed during the hearings has convinced your committee that bank holding companies are not in accord with the very precepts upon which our banking system rests."[49] The Report stated that "the bank holding company device threatens to destroy . . . the independent unit bank";[50] that they are "thwarting national banking policy";[51] that they are being formed to "circumvent the branch banking prohibitions";[52] that they are susceptible to abuse."[53]

With reference to the Solicitor General's contention herein that the Court of Appeals erred by applying the branch-banking restrictions "to separately chartered banks owned by a holding company," the House Report specifically stated:[54]

> "Great stress has been placed on their difference in form, which everyone of course recognizes. Your committee feels, however, in a large measure they are differences without a distinction . . . .

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[47] S. 3573, 75th Cong., 3d Session.

[48] P.L. 511, 84th Cong., 2d Session.

[49] House Report 609, 84th Cong., 1st Session, pp. 1, 2.

[50] House Report 609, 84th Cong., 1st Session, p. 2.

[51] House Report 609, 84th Cong., 1st Session, p. 2.

[52] House Report 609, 84th Cong., 1st Session, pp. 2, 3.

[53] House Report 609, 84th Cong., 1st Session, p. 3.

[54] House Report 609, 84th Cong., 1st Session, p. 3.

> "Bankers certainly should know whether bank holding company subsidiaries can in effect be operated as branches. A bankers' association asked the bankers of the country this question: 'Do you consider holding company banking, in effect, branch banking'? More than 97% of the replies were 'Yes'."

And, when the Holding Company Act reached the floor of the Senate, in 1956, Senator Capehart, ranking minority member of the Senate Committee on Banking and Currency, directed the following question to Senator Robertson, Chairman of the Committee:[55]

> "*Mr. Capehart:* Is the object of the bill not to make certain that bank holding companies do not expand, and that bank holding companies shall not be permitted to do that which banks cannot do? Broadly speaking, is that not what is sought to be done?
>
> "Mr. Robertson: That is absolutely correct . . . ."

In essence, therefore, Congress in 1956, recognizing the holding company situation as it existed by that time, went as far as it appropriately could when it passed the Federal Bank Holding Company Act. Not only did it provide a federal regulatory scheme to deal with certain aspects of the traditional holding company operation, but it expressly reserved to the States their right to be "more severe" and even to prohibit holding company operations within their borders.[55a]

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[55] Cong. Record, 84th Cong., 2d Session, p. 6853.

[55a] 12 U.S.C. §§ 1842(d), 1846; Sen. Report 1095, Part 2, 84th Cong., 2d Sess., p. 5.

In no respect did Congress, so legislating in this field, intend to provide the Comptroller of the Currency with some new vague authority, as petitioners seem to contend, (a) to meet with a national bank and agree that a holding company device should be adopted as a means of evading the prohibitions of the National Bank Act; (b) to issue a charter to a "phantom bank" to assist the national bank to accomplish its unlawful purpose, knowing that said "phantom" would never commence the business of banking as contemplated by the National Bank Act (12 U.S.C. §§ 21, 24, 27); (c) to approve the merger of the largest national bank in Louisiana into this "phantom," solely to provide a vehicle for eliminating dissenting stockholders of the national bank involved (12 U.S.C. § 215(b), (c)) and without substantial compliance with the requirements of the Bank Merger Act (12 U.S.C. § 1828(c)); and (d) to permit the national bank to siphon off $1,000,000. of its funds to create a holding company device for the sole purpose of establishing bank offices at a place prohibited by the National Bank Act (12 U.S.C. § 36c).

It is equally clear that Congress, in 1956, did not repeal the rule of law referred to in Solicitor General Lehmann's Opinion, and it did nothing to strip the federal courts of their inherent authority in equity to apply, as the Court of Appeals did here, that rule whenever necessary to uphold the prohibitions of the National Bank Act. In fact, Congress specifically provided, in Section 11 of the Federal Bank Holding Company Act (70 Stat. 139; Note, 12 U.S.C. 1841):

> "Nothing herein contained shall be interpreted or construed as approving any act, action, or conduct which is or has been or may be in violation of existing law. . . ."

III.

THE DISTRICT COURT LIKEWISE CORRECTLY ENJOINED THE COMPTROLLER FROM LICENSING UNDER 12 U.S.C. § 27 A BANKING OPERATION FURTHER DIRECTLY PROHIBITED BY THE LOUISIANA BANK HOLDING COMPANY ACT, ADOPTED BY LOUISIANA PURSUANT TO RIGHTS EXPRESSLY RESERVED TO THE STATES BY THE FEDERAL BANK HOLDING COMPANY ACT.

The licensing of Whitney's proposed operation in Jefferson Parish was correctly enjoined not only because it constituted a clear-cut attempt to evade and defeat the prohibitions of Section 36c of the National Bank Act, but also because it is *directly* and expressly prohibited by Section 3(5) of the Louisiana Bank Holding Company Act (Act 275 of 1962, 2 L.S.A.-R.S. 6:1001-6:1006 (1962 Supp.)), which, as here pertinent, provides:

> "It shall be unlawful . . . (5) for any bank holding company or subsidiary thereof to open for business any bank not now opened for business . . . ."

The said Louisiana statute, concededly intended to be directly applicable to petitioner Whitney, was enacted pursuant to the provisions of Section 7 of the Federal Bank Holding Company Act of 1956 (12 U.S.C. § 1846), which states:

> "*Reservation of rights to States*—The enactment by the Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies and subsidiaries thereof."

In *Bracburn Securities Corp.* v. *Smith*, 15 Ill. 2d 55, 153 N.E. 2d 806 (1958), *appeal dismissed for want of a substanital federal question*, 359 U.S. 311, Illinois, like Louisiana, passed a very similar State Bank Holding Company Act in 1957, pursuant to the reservation of

States' rights contained in 12 U.S.C. § 1846. Braeburn Securities Corporation brought suit in the Illinois courts, *contending precisely as petitioners have done in the case at bar*, that the Illinois statute was (a) unconstitutional and (b) void, insofar as it applied to national bank subsidiaries of bank holding companies. The Illinois Supreme Court upheld the statute as constitutional and *as a proper State regulation of national bank subsidiaries of holding companies within the provision of 12 U.S.C. § 1846.* Braeburn appealed to this Court, contending in a supporting brief (Docket 718, October 1958 Term) precisely as petitioners have been doing in the case at bar, that—

> "Ever since *McCulloch* v. *Maryland*, 4 Wheat. 316—jurisdiction over internal affairs of national banks was exclusively in the Federal Government, and any State law which undertook to limit or control such banks is void . . . ."

The State Auditor of Illinois thereupon filed a motion to dismiss Braeburn's appeal. *He contended Illinois had the clear right under 12 U.S.C. §1846 to regulate or prohibit bank holding companies whether they attempted to operate through national or state bank subsidiaries.* This Court, in a *per curiam* opinion in 1959, granted the motion to dismiss on the ground that the case failed to present a substantial federal question. Dismissal on that ground, of course, is an action even stronger than judicial affirmance (*Milheim* v. *Moffat Tunnel Improvement Dist.*, 262 U.S. 710, 716, 717 (1923)).

See also: *Opinion of the Justices of New Hampshire*, 151 A. 2d 236, which upheld the proposed New Hampshire Bank Holding Company Act against contentions very similar to those advanced in *Braeburn* and again in the case at bar.

By so ruling in *Braeburn*, this Court simply reaffirmed that national banks, which are instrumentalities of the Federal Government and subject to the paramount authority of the United States, are nevertheless subject to State laws and prohibitions *whenever Congress so provides (Mercantile National Bank at Dallas* v. *Langdeau*, 371 U.S. 555, 559 (1963)). For example, as demonstrated in Point II of this brief, Congress long before 1956, specifically made State law "the measuring stick for the establishment of branches by national banks" and application of those State restrictions and prohibitions to national banks has been recognized and upheld by this Court and others in the federal system (*United States* v. *Philadelphia National Bank*, 374 U.S. 321, 328 (1963); *Wayne Oakland Bank* v. *Gidney, Supra; Commercial State Bank* v. *Gidney*, 174 F. Supp. 770, affd. 278 F. 2d 871 (D.C. App. 1960)). In certain other instances, Congress has applied State law to fix the allowable capitalization of new national banks (12 U.S.C. § 51); to limit national banks to interest rates prescribed for state banks (49 Stat. 191 (1933), as amended, 12 U.S.C. § 85 (1958)). National banks may be granted trust powers *only* when "not in contravention of State or local law . . . ." (76 Stat. 668 (1962), 12 U.S.C. § 92(a)). No conversion of a national bank to a state bank, or its merger with a state bank, may take place in "contravention of the law of the State in which the national banking association is located" (64 Stat. 456 (1950), 12 U.S.C. § 214c (1958)). Congress has also reserved to the States broad areas of taxation of national banks (44 Stat. 223-24 (1926), 12 U.S.C. § 548 (1958)), and Congress has "expressly exercised its power to permit national banks to be sued in certain state courts as well as in federal courts" (*Mercantile National Bank* v. *Langdeau, supra*, at page 560).

Moreover, in the Federal Bank Holding Company Act, Congress went to great detail to make it clear that the Reservation of States' Rights contained in Section 7 of the Act applied to *both* national and state bank subsidiaries of holding companies. In 12 U.S.C. § 1841 (c) it defined the word *"bank,"* later employed in 12 U.S.C. § 1846, to include *"any national banking association or any State bank."* The word *"subsidiary,"* also later employed in 12 U.S.C. § 1846, was defined at 12 U.S.C. § 1841(d) to include *"any company 25 per centum or more of whose voting shares . . . is owned or controlled by [a] bank holding company."* And finally, the word *"company"* is even defined, at 12 U.S.C. § 1841(b), to mean *"any corporation."* The sum total of these definitions makes it crystal clear that Congress, in 12 U.S.C. § 1846, fully intended to preserve to the States the right to regulate, control and prohibit, if desired, all bank holding company operations within their respective borders, and to prevent, if necessary, the opening within State borders of any *subsidiary bank*, state or national, owned or controlled by a holding company.

Any remaining doubt in this connection was absolutely dispelled when the Federal Bank Holding Company Act was before Congress in 1955 and 1956. Chairman Spence of the House Committee, and the House Report itself, made it perfectly clear that the Act reserved to the States "every right they have, *now or hereafter*, . . . to regulate banks or bank holding companies."[56] The Senate Report in support of the bill specifically authorized the States to be *"more severe," "more restrictive" on holding companies and their state or national bank subsidiaries* than "this bill em-

[56] Cong. Record, 84th Cong., 1st Sess., p. 8021; 8044.

powers the Federal authorities to be or such Federal authorities actually are in their administration of this bill" [57] The Senate Report then concluded:[58]

> "It is always of uppermost importance in legislation of this nature to preserve the dual system of National and State banks, and section 7 must be viewed in that light."

Chairman Robertson of the Senate Banking Committee took the floor during the Senate debate on the bill, in 1956, and stated:[59]

> ". . . A State should have the right to permit or prohibit branch banking, and at the same time, it should have the right to permit or prohibit the operation of bank holding companies within its borders . . . .
>
> "Therefore, each State may, within the limits of its proper jurisdictional authority, enact legislation to regulate bank holding companies. Mr. President, as an example of the type of legislation the States may enact, I ask unanimous consent to have printed in the Record the text of a bill recently passed by the Georgia Legislature."

The Georgia bill printed in the Congressional Record, at pages 6752, 6753, provided for State control of *both* state and national bank subsidiaries of holding companies.

Furthermore, when the Federal Bank Holding Company Act was before the Senate, Senator Douglas of

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[57] U.S. Code and Congressional News, 1956, p. 2493.

[58] Senate Report 1095, Part 2, 84th Cong., 2d Sess., p. 5.

[59] Cong. Record, 84th Cong., 2d Sess., p. 6752.

Illinois offered an amendment, now contained at 12 U.S.C. § 1842(d) and entitled "*Limitation by State Boundaries.*" This provision prohibited approvals by the Federal authorities of any holding company acquisitions in any State by an "outside" or foreign bank holding company or any of its subsidiaries—*unless the State's statutory laws specifically authorized such acquisitions.*

Thus, in the final analysis, the Act contains *two separate provisions*, (12 U.S.C. § 1842(d) and 1846) whereby Congress authorized the States, including Louisiana, to be as severe and as restrictive as conditions warrant in their regulation or prohibition of holding company operations and expansions within their respective borders; and Congress left the States free to enforce those prohibitions irrespective of whether a holding company sought to operate through a state or national bank. Such was the conclusion which undoubtedly supported this Court's dismissal of the appeal in *Bracburn.*

But in the case at bar, Louisiana Act 275 of 1962 has *not* even operated to forbid the opening of a *national bank, already chartered. Petitioner Whitney, under the provisions of the National Bank Act (12 U.S.C. § 24), remains today nothing more than a mere corporation or "body corporate."* It has never been licensed to commence the business of banking (12 U.S.C. § 27), and thus it *has not* attained the true status of a "national bank." Thus, there is absolutely no validity whatsoever to petitioners' contention that the Louisiana statute somehow collides with the National Bank Act, and none of the cases relied on by petitioner Whitney, at pages 43-46 of its brief, or by

petitioner Saxon, at pages 70, 71 of his brief, are in any respect apposite.[60]

Nor is there any validity to petitioner Whitney's claim that the Louisiana statute violates the Fourteenth Amendment. Louisiana patently had the constitutional right to exercise its police power to protect and preserve the vital interests of the community (*Stone* v. *Mississippi*, 101 U.S. 814; *Douglas* v. *Kentucky*, 168 U.S. 488; *Home Building and Loan Association* v. *Blaisdell*, 290 U.S. 398, 437, 444-448; *East New York Savings Bank* v. *Hahn*, 326 U.S. 230, 233). In fact, in *Ferguson, Attorney General of Kansas* v. *Skrupa*, 372 U.S. 726 (1963), this Court held that Kansas clearly had the right to outlaw the business of "debt adjusting" and to prohibit existing "debt adjusters" from continuing to operate. It was stated, at pages 731, 732:

> "We conclude that the Kansas Legislature was free to decide for itself that legislation was needed to deal with the business of debt adjusting . . . . We refuse to sit as a 'superlegislature' to weigh the wisdom of legislation,' and we emphatically refuse to go back to the time when Courts used the Due Process Clause 'to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.' Nor are we able or willing to draw lines by calling a law 'prohibitory' or 'regulatory.'"

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[60] In fact, the Federal Reserve Board itself, in a case decided by it *after* the decision of the District Court in this action, actually applied Nebraska law to deny a holding company application for the acquisition of stock in a national bank (*Trans-Nebraska Co.*, FHB No. BHC—66. Excerpts from that decision are included in the Supplemental Appendix to this brief.

Petitioner Whitney is also powerless to contend that Act 275 denies "equal protection." It clearly applies equally to all bank holding companies, foreign or domestic, to all commercial banks, and to all holding company subsidiaries as therein defined (6 La. R.S. 1001, 1002). It is in no respect discriminatory and it prohibits the same holding company operations to all concerned without favor or caprice. The fact that Whitney was the only organization attempting to thwart the public policy of the State when the law was passed was Whitney's fault—not the State's.

IV.

THE COURT OF APPEALS AND THE DISTRICT COURT CORRECTLY HELD THAT RESPONDENT BANKS HAD STANDING TO SUE THE COMPTROLLER OF THE CURRENCY TO ENJOIN HIM FROM ARBITRARILY AND CAPRICIOUSLY LICENSING AN UNLAWFUL OPERATION, AIMED AT DEFEATING THE NATIONAL BANK ACT WHICH IT IS HIS DUTY TO ADMINISTER. SUCH SUIT IN NO RESPECT CONSTITUTES A COLLATERAL ATTACK UPON A DECISION OF THE FEDERAL RESERVE BOARD MADE UNDER A DIFFERENT STATUTE AND INVOLVING TOTALLY DIFFERENT MATTERS AND DIFFERENT PARTIES.

A. Respondent Banks' Standing To Sue

In its Findings of Fact in support of the Permanent Injunction herein, the District Court found that respondent banks had proved, through *sworn, uncontradicted* facts, that, if the Comptroller of the Currency was not prohibited from issuing his Certificate of Authority to Whitney-Jefferson, each of the respondent banks would sustain serious, irreparable injury and damage (R. 448). The District Court therefore concluded (R. 449):

> "5. Plaintiff and intervening plaintiff banks, faced with proposed invasion of property rights and injury from the proposed unlawful issuance

by defendant Comptroller of a Certificate of Authority to intervening defendant Whitney-Jefferson, have standing to bring this suit, and they have no other adequate remedy at law (*Wisconsin Bankers Association* v. *Robertson*, 190 F. Supp. 90, 94, affd. 294 F. 2d 714 (App. D.C.), *cert. denied* 368 U.S. 938, *rehearing denied* 368 U.S. 979 (1961); *Commercial State Bank* v. *Gidney*, 174 F. Supp. 770, affd. 278 F. 2d 871 (D.C. App., 1960); *Wayne Oakland Bank* v. *Gidney*, 252 F. 2d 537, *cert. denied*, 358 U.S. 830)."

More specifically, respondents, Bank of New Orleans and Bank of Louisiana proved *without contradiction from either petitioner*, that they maintain their banking offices entirely within the Parish of Orleans, and that they are prohibited by the same laws, which heretofore have also prohibited Whitney National Bank of New Orleans, from establishing any banking facilities whatsoever in Jefferson Parish or any parish of Louisiana other than Orleans (R. 201, 303). Each of these two respondents, however, proved that they have "a very large number . . . of customers, depositors and borrowers who reside in and are principally located *in Jefferson Parish*," where the Comptroller proposes *unlawfully to license Whitney to open and operate, in violation of the federal and state statutes* (R. 201, 202; 303). Respondent, Bank of New Orleans, proved that it possessed checking accounts at its New Orleans offices of depositors *from Jefferson* in the sum of $2,029,000.; such accounts being maintained by 2,812 individuals and businesses (R. 202). These deposits represented 12.3% of that respondent's total deposits (R. 202). In addition, said Bank of New Orleans proved it possessed commercial loans (in excess of $10,000.),

and promissory notes and other indebtednesses from persons and businesses and secured by property *located in Jefferson Parish*, amounting to approximately $3,410,000. (R. 202). These accounted for approximately 15% of that bank's total commercial loans in excess of $10,000.00. In addition, said respondent also had loan accounts of less than $10,000. in "large volume" from other persons and corporations *in Jefferson Parish* (R. 202). Similar uncontroverted proof was presented by respondent, Bank of Louisiana (R. 304).

Each of these respondents then stated in sworn testimony (R. 202, 304):

> "Accordingly, should the Comptroller of the Currency authorize the Whitney National Bank of New Orleans, the largest bank in the State, with combined resources of . . . ½ billion dollars, to open branch bank facilities through one device or another in Jefferson Parish, plaintiff(s) would necessarily suffer severe loss of loans, deposits and other business and would sustain damage to (their) business and profits exceeding $50,000. per year. Additionally, if the Comptroller is permitted to issue the certificate of authority as he proposes to do unless enjoined, (these) plaintiff(s) would have no adequate remedy at law and would be unable to defend (themselves) against the diversion to and appropriation by said Whitney National Bank of a substantial part of the banking business and services now enjoyed . . . ."

Respondent, Guaranty Bank & Trust Company of Lafayette, Louisiana, introduced similar sworn proof of irreparable injury, damage and loss for which it had no adequate remedy at law (R. 305, 306).

Under circumstances such as those set forth hereinabove, this Court recently denied certiorari in two cases wherein it had been held that plaintiff banks had standing to sue (*Wayne Oakland Bank* v. *Gidney, Comptroller of the Currency*, CCA 6, 1958, 252 F. 2d 537, *cert. denied* 358 U.S. 830; *Wisconsin Bankers Association* v. *Robertson*, 190 F. Supp. 90, 94, affd. 294 F. 2d 714 (App. D.C.), *cert. denied* 368 U.S. 938, rehearing denied 368 U.S. 979 (1961)).

In the *Wayne* case, the Sixth Circuit Court of Appeals ruled, at page 544:

> "As to the standing of the Wayne Oakland Bank to maintain its suit, it was faced with invasion of property rights, and injury from a competition that was prohibited by the federal statutes subjecting national banks to the same rules of law as cover the state banks . . . . Whether the rights of a party are infringed by unlawful action of an individual or by exertion of unauthorized federal administrative power, it is entitled to have such controversy adjudicated."

In the *Wisconsin Bankers* case, *supra*, Judge Tamm of the United States District Court for the District of Columbia carefully reviewed this Court's decisions in *Alabama Power Co.* v. *Ickes* and *Tennessee Electric Power Co.* v. *TVA*, relied on by the Comptroller (at pages 38-40) in his brief, and then rejected the contention there made that plaintiffs lacked standing to sue. He stated, at 190 F. Supp. 90, 94:

> "The defendants deny that the plaintiffs have alleged any injury or threat to a particular right of their own and therefore challenge the plaintiffs' status to sue.
>
> "Briefly stated, the defendants rely upon a substantial number of cases cited in the footnote

> below which set forth the established principle that in order to have status to sue, the plaintiffs must establish that some legal interest of theirs, personal to them and recognized by law, has been violated to their legal injury. The Court has carefully reviewed the cited cases and finds in them no situation legally comparable to the status of these. . . . Collectively the plaintiffs by federal or state charters are empowered to conduct banking business in the State of Wisconsin. No other institutions are so empowered. The plaintiffs' charter, then, represents a property right which they are entitled by law to protect. As indicated this status differentiates these plaintiffs from all of the plaintiffs in the enumerated cases."

Please see also: *Commercial State Bank* v. *Gidney*, 174 F. Supp. 770, 780, affd. 301 F. 2d 521 (D.C. App. 1960), wherein the District Court stated:

> "The plaintiffs are two state banks within two and a half miles of the proposed location of National's branch; they are seeking to enjoin unlawful competition which threatens them irreparable and immediate damage. . . . Under the circumstances of this case, the Court is of the opinion that plaintiffs have standing to bring this suit."

This Court's decisions in cases where plaintiffs have sought injunctive relief against a Government officer's or agency's attempt to license an unlawful competition or otherwise unlawfully to exceed or ignore the limits of authority provided under a federal statute have not been to the contrary (*Frost* v. *Corporation Commission*, 278 U.S. 515; *Columbia Broadcasting System, Inc.* v. *United States*, 316 U.S. 407; *Stark* v. *Wickard*, 321 U.S. 288). In *Stark* v. *Wickard*, for example, this

Court discussed the applicable rule as follows, at page 304:

> "It is . . . when a complainant possesses something more than a general interest in the proper execution of the laws that he is in a position to secure judicial intervention. His interest must rise to the dignity of an interest personal to him and not possessed by the people generally. Such a claim is of that character which constitutionally permits adjudication by courts under their general powers."

And, with regard to the Comptroller's contention (at page 38 of his brief) that respondent banks have no standing to sue to restrain his alleged unlawful acts because Congress failed to provide for such review in the National Bank Act, this Court stated in *Stark* v. *Wickard*, at pages 309, 310:

> ". . . the silence of Congress as to judicial review is, at any rate in the absence of administrative remedy,[61] not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction. When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. This permits courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justifiable individual rights against administrative action fairly beyond the granted powers. The responsibility of determining the limits of statutory grants of authority in such

[61] The Comptroller, readily admits, at page 38 of his brief, that respondents have never had any administrative remedy under the National Bank Act.

> instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction. . . . *Under Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by exertion of unauthorized administrative power.*" (Italics supplied).

In *J. B. Montgomery, Inc.* v. *United States*, 206 F.Supp. 455 (D.C. Colo., 1962), affirmed 376 U.S. 389 (1964), the District Court ruled at page 458:

> "Administrative determinations must have a basis in law and must be within the granted authority, and it is a judicial function and not an administrative function to determine the limits of the statutory power."

The District Court went on in *Montgomery* to hold that the agency there involved "was without statutory authority" to act as it had. This Court affirmed in March of this year.

When these principles and authorities are applied to the case at bar, it becomes obvious that the District Court and Court of Appeals both correctly ruled that respondent banks possessed standing to sue the Comptroller to restrain him from licensing a competitive banking operation prohibited to Whitney by law (R. 448, 449; 466-470). As stated below, any denial of such standing would leave the Comptroller in the autocratic position where his wrongs, in violation of the statute he administers, would be without remedy and beyond the scope of judicial review. And, contrary to the

Comptroller's position herein,[62] such denial and his proposed unlawful act would clearly deprive respondents of their property and statutory rights without due process of law.[63]

B. The District Court Clearly Had Jurisdiction to Entertain This Action and Affirmance of the Court of Appeals on its Standing to Sue Holding is Absolutely Essential.

When the District Court found that respondent banks had standing to sue, there could no longer be any question regarding the Court's jurisdiction or the right of respondent banks to judicial review under the Administrative Procedure Act (5 U.S.C. § 1001, 1009). *Wisconsin Bankers Association* v. *Robertson*, 190 F. Supp. 90, 94; affd. 294 F.2d 714, *cert denied* 368 U.S. 938, rehearing denied 368 U.S. 979 (1961). As stated by this Court in *Stark* v. *Wickard*, *supra*, such suits fall within "the general jurisdiction of the federal courts under Article III of the Constitution." It is equally clear, however, that jurisdiction was also properly grounded on 28 U.S.C. § 1331, which gives the district courts original jurisdiction of all civil actions arising under the Constitution and laws of the United States. Finally, respondents' right to judicial review of the Comptroller's proposed unlawful action is likewise guaranteed by the language of the Administrative Procedure Act itself, which provides:

> "(a) Any person suffering legal wrong because of an agency action, or adversely affected or aggrieved by such action within the meaning of

[62] At page 37 of his brief.

[63] As stated in the Comptroller's brief, a district court in North Carolina recently ruled that the Comptroller's entire secret, nonhearing process unconstitutionally denies due process of law (*First National Bank of Springfield* v. *Saxon*, U.S.D.C.E.D.N.C.).

any relevant statute, shall be entitled to judicial review thereof.

"(b) The form of proceeding for judicial review shall be . . . any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory injunction . . .) in any court of competent jurisdiction.

"(c) Every . . . final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. . . ."

Respondent banks submit that they would, as stated above, clearly suffer a legal wrong if the Comptroller were permitted unlawfully to license the opening and operation of Whitney in Jefferson Parish; that they would be adversely affected or aggrieved by such action within the meaning of Section 36(c) of the National Bank Act and under the Louisiana Bank Holding Company Act, as authorized by 12 U.S.C. 1846; and that the action filed in the District Court, being a suit for declaratory judgment and prohibitory injunction, was correct in form.

Finally, these respondents assert that there is no other *"adequate remedy in any court"* to prevent or rectify the Comptroller's proposed final action. The Comptroller admits, at page 38 of his brief, that there is "*no* provision for an administrative hearing and *no* authorization for competitors to appear before the Comptroller" to contest his actions—"his decisions are made *ex parte*. . . ."[64] The Comptroller himself goes further to demonstrate the urgent necessity for respondents' suit here by stating, again at page 38 of his brief: "There are, moreover, *no* statutory provi-

[64] Comptroller's brief, p. 38.

sions for judicial review (in the National Bank Act); *indeed there is no administrative record of the evidence and arguments upon which the Comptroller bases his action.*" What an excellent opportunity for the creation and maintenance of a diabolic autocracy, without any due process of law, if this Court should rule, as the Comptroller contends, again at page 38 of his brief, that there should be no "forum where competitors could protect an alleged right to be free of *unauthorized competition.*"

The Comptroller, of course, completely misses the point upon which this action is based. He states, at page 39 of his brief: "Unless those engaged in a business have a *statutory right* to be free of competition, they have no standing to challenge an administrative action. . . ." But, respondent banks do have a *"statutory right" to be free of Whitney's unlawful competition!* That *statutory right* is twofold: First, under the provisions of Section 36(c) of the National Bank Act; and secondly, under the Louisiana Bank Holding Company Act, as authorized by 12 U.S.C. 1846.

If this Court can possibly convince the Comptroller that his *ex parte* realm is not impregnable, a new era of statutory responsibility might soon dawn, wherein the Comptroller will at least hesitate before he helps devise, abet and seek to ram through illegal programs aimed at destroying the prohibitions of the very Act he is charged to uphold. This Court will certainly remember the boldness of the Comptroller in the recent *Philadelphia National* and *Lexington, Kentucky* bank merger cases,[65] where the Comptroller, over the

[65] *United States* v. *Philadelphia Nat. Bk.*, 374 U.S. 321; *United States* v. *First Nat. Bank of Lexington*, 84 S. Ct. 1033.

unanimous opposition of all other Government agencies involved, sought nevertheless to license the mergers later struck down by landmark decisions of this tribunal. This Court is probably also aware of the Comptroller's tenacity when, as a federal official, he sought recently, in two other district court cases, to intervene, *as a party adverse to the Government*, when the Department of Justice sought to prevent the culmination of other bank mergers approved by him.[66] His latter actions were so bizarre that the Justice Department felt constrained to apologize to the District Court in its written memorandum of opposition to his intervention:[67]

> "We note that while the paper which Mr. Saxon has sought to file indicates he wishes to appear '*pro se*,' this must manifestly be a reference to the fact that he appears without counsel, and does not mean that he deeems himself to be personally interested in the litigation. . . . It is (a) basic and unfortunate misapprehension which accounts for the Comptroller's effort *to align himself as a party defendant in a suit brought by the United States to enforce an Act of Congress. We apologize to the Court for the action of an officer of the executive branch seeking to intervene in this action without counsel and without legal authority.*" (Italics supplied).

The absolute importance of a decision by this Court affirming the Court of Appeals on the standing to sue

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[66] *United States* v. *Crocker-Citizens National Bank*, U.S.D.C.N.D. Cal. 3/23/64; *United States* v. *Third Nat. Bk. of Nashville*, *D.C. Tenn.* 9/29/64. Both Courts denied his motions to intervene on the dates just stated.

[67] Filed by the Government in *United States* v. *Third Nat. Bk. of Nashville*, *supra*.

and jurisdictional aspects of this case also lies in the fact that once the Comptroller is permitted to license an illegal operation, *respondent banks would have no remedy whatsoever.* A good analysis of this vital problem is contained in Judge Youngdahl's decision in *Commercial State Bank of Roseville* v. *Gidney, supra.* Judge Youngdahl there concluded that, once the Comptroller issues his certificate, "the facts upon which (he) bases his decision cannot be questioned by anyone except the United States" (174 F. Supp. 770, 778). He went on to state, at page 779:

> "'While plaintiffs . . . might succeed in persuading the United States Attorney General to institute quo warranto proceedings . . ., the remedy is hardly an 'adequate' one; it is speculative at best and in the Court's opinion not sufficient to prevent the issuance of a preliminary injunction. Cf. *Columbian Cat Fanciers* v. *Koehne*, 1938, 68 App. App. D. C. 257, 96 F.2d 529, 532, in which it was held that the remedy of quo warranto is not an 'adequate remedy at law,' so as to preclude equitable relief, where the party interested must appeal to the discretion of some other person or body to maintain quo warranto."

In the case at bar, the Department of Justice and its attorneys have consistently acted as counsel for the Comptroller. There remains no hope that they might suddenly reverse themselves and advise the Attorney General to attack that which his department has been defending. Hence, respondents' sole remedy is in the suit here involved. If it is taken from them, the illegal operation will be licensed, the vast irreparable damage will be done, and equity, contrary to its most fundamental principle, will have suffered a wrong to be without a remedy.[68]

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[68] See 30 C.J.S., § 105, p. 506.

C. This Suit to Enjoin the Comptroller From Licensing the Opening of an Unlawful Banking Operation Under the National Bank Act in No Respect Represents a Collateral Attack Upon a Decision of the Federal Reserve Board Made Under a Different Statute, and in a Case Involving Entirely Different Matters and Different Parties.

Petitioners both admit in their briefs that "Approval of two federal agencies was necessary before the Whitney program could be put into effect."[69] As stated by the Comptroller, at page 6:

> "The program . . . required (a) the approval of the Comptroller of the Currency (*under the National Bank Act*) for the chartering of the (Jefferson) bank and (b) the permission of the Board of Governors of the Federal Reserve System (*under the Bank Holding Company Act*) for the holding company's acquisition . . . of the (shares) of the . . . bank in Jefferson Parish."

The Comptroller also patently recognizes, at pages 19, 20 of his brief, that *two completely separate and different statutory proceedings* had to be followed—(a) the first, *by the holding company alone* (Whitney Holding), to obtain the Board's approval, under the Holding Company Act (12 U.S.C. 1842), of the proposed stock acquisitions *only*, and (b) the second, *by the national banking association alone* (Whitney Jefferson), to obtain a Certificate of Authority from the Comptroller of the Currency, under the National Bank Act (12 U.S.C. 24-27), authorizing the association to commence the business of banking.

The two statutory proceedings, one under the National Bank Act and the other under the Federal Bank Holding Company Act, are completely independent of each other as a matter of law. The National

[69] Comptroller's brief, pp. 6, 19, 20; Whitney brief, p. 7.

Bank Act proceeding is administered exclusively by the Comptroller of the Currency. The Board plays *no* statutory part in these proceedings and it possesses no jurisdiction to license or refuse to license the opening of a national bank or a branch thereof (See 12 U.S.C. 21-27). That administrative function is the Comptroller's alone (12 U.S.C. 27).

The Federal Bank Holding Company Act proceeding, on the other hand, is under the jurisdiction of the Board (12 U.S.C. 1842(a), (b)). The Board *alone* has the authority to grant or deny an application by a holding company for the right to acquire the shares of any bank (12 U.S.C. 1842(b)).

As stated above, the proceeding before the Comptroller under the National Bank Act is commenced and prosecuted exclusively by the proposed national banking association (12 U.S.C. § 21-27). The Holding Company Act proceeding on the other hand, is commenced and prosecuted by the proposed holding company (12 U.S.C. 1842). Thus, in the case at bar, Whitney Jefferson's application to commence banking was filed with the Comptroller (R. 380, 381), while Whitney Holding's separate application for permission to become a bank holding company and to acquire bank shares was filed with and prosecuted before the Board (*Comp. Ex. 4, R. 52, et seq.*). Hence, the two administrative proceedings involved

(1) completely different matters and objects,

(2) completely different applicants and applications, and

(3) entirely different and separate determinations —i.e., (a) the licensing of the proposed banking opera-

tion by the Comptroller, and (b) a permit (issued by the Board) to the Holding Company to acquire shares in the two banks.

Congress, of course, has also prescribed completely different and separate administrative proceedings to be pursued under the two statutes. Under the Holding Company Act (12 U.S.C. 1842), after the holding company application is received by the Board, the Board obtains "views and recommendations" of the Comptroller and/or the State supervisory authority, as the case may be. *Only if such state or federal authority disapproves the application must the Board schedule the matter for a hearing (12 U.S.C. 1842(b)).* If the Comptroller, for example, approves, *no hearing need be held* (12 U.S.C. 1842). *Indeed, in the case at bar, no such hearing was ever held because the Comptroller did approve.* The Board merely scheduled an informal conference proceeding at its headquarters in Washington (as distinguished from a regular hearing in Louisiana) to receive *"oral views and comments"* (R.62). The Board then rendered its decision, *limited to the following* (R.97): (i) *Whitney Holding was permitted to become a holding company, and* (ii) *Whitney Holding was authorized to proceed to acquire the stock of the two Whitney subsidiaries.* That decision alone was subject to judicial review under 12 U.S.C. 1848; and the *review provided by that Section in no respect authorized any relief, injunctive or otherwise, against the Comptroller.*

As stated by the Comptroller, at pages 19, 20 of his brief, Congress has prescribed an entirely different administrative course to be followed under the National Bank Act. This procedure, in his own words, is as follows:

> "The National Bank Act, however, makes no provision for an administrative hearing or for judicial review, and the Comptroller's decisions are made informally, without an administrative record."

But, as stated hereinabove, Congress and the Courts have provided that the Comptroller has no authority to license the opening of a banking operation which is *not "lawfully entitled to commence"* (12 U.S.C. 27; *Camden Trust Co.* v. *Gidney, supra; Commercial State Bank* v. *Gidney, supra; Union Savings Bank of Patchogue* v. *Saxon, supra*).

Hence, it should be clear to all—principally the Comptroller—that the sole purpose of this action is to enjoin him from licensing, under the National Bank Act, an illegal banking operation, which is not lawfully entitled to commence. This suit seeks no relief, directly, indirectly or collaterally against the Federal Reserve Board. That Board and Whitney Holding Corporation are not even parties to this action. Neither has ever sought to intervene or to be represented at any of the proceedings herein. Nor, will the injunctive relief granted by the Courts below operate to stay or enjoin the Federal Reserve Board in any respect, and it does not apply to reverse, set aside, or modify any order or opinion of that Board. *Those matters, those parties (the Board and Whitney Holding) and the legality of the stock acquisitions* there involved are exclusively before the Fifth Circuit Court of Appeals in *Bank of New Orleans and Trust Company, et ano.* v. *Federal Reserve Board, and Whitney Holding Corporation, supra.*

But, just as this case in no respect involves the questions or parties at issue in the Fifth Circuit case—

the Fifth Circuit case under 12 U.S.C. 1848 likewise in no manner involves the Comptroller of the Currency as a party; or Whitney Jefferson as a party; or the question of whether the Comptroller should be enjoined from licensing Whitney Jefferson under the National Bank Act. That case is limited to a review of the *"stock acquisition"* question *only*, and the outcome there will be binding on the Board and Whitney Holding—but not on the Comptroller and Whitney Jefferson.

If this fact were not otherwise clear, the Comptroller made it irrefutable in a sworn affidavit herein (R. 310). He advised the District Court under oath, on August 9, 1962 (R. 310):

> "4. I am advised that review of the Board's Order of May 3, 1962, is presently being sought before the United States Court of Appeals for the Fifth Circuit. . . .
>
> "5. On July 10, 1962, the Governor of the State of Louisiana approved Act 275, entitled 'An Act to define the bank holding company, to prohibit the formation of new bank holding companies, and to control the future expansion of existing bank holding companies and of their subsidiaries.'
>
> "6. Upon consideration of these subsequent developments, . . . *I have concluded that there has occurred no reason to alter the Comptroller's prior determination that a certificate of authority should be issued to Whitney National Bank in Jefferson Parish, pursuant to 12 U.S.C. § 27*
>
> "7. *Accordingly, if the preliminary injunction entered herein is vacated*, and if Whitney National Bank in Jefferson Parish so requests, . . . *it is my present intention to issue such certificate.*" (Italics supplied).

In the light of this open, sworn threat, it is impossible to fathom how the Comptroller can urge so speciously in his brief that respondents have a full and adequate remedy in the proceedings now in the Fifth Circuit; or that this suit somehow is intended solely as a collateral attack on the decision of the Federal Reserve Board. Obviously, respondents have no full and adequate remedy in those proceedings. *If the injunction in this case is lifted, the Comptroller intends forthwith to license the opening of the unlawful banking operation, in violation of the National Bank Act. Respondents cannot enjoin the Comptroller from doing this in the Fifth Circuit case for all the reasons given. Ergo.*, this suit is respondents' sole means of effective relief, and it must be sustained by this Court (*Columbia Broadcasting System, Inc.* v. *United States*, 316 U.S. 407, 423, where this Court sustained a suit for injunctive relief in circumstances where other administrative remedies were either inapplicable or entirely insufficient).

At page 28 of the Comptroller's brief, he states: "If the Comptroller is bound by the decision of the Federal Reserve Board . . . he cannot be enjoined to disregard the Board's decision." But, the decision of the Board *does not* direct the Comptroller to do anything under the National Bank Act. The Board does not direct or instruct the Comptroller to issue his Certificate of Authority. Its decision is limited to the holding company's stock acquisition alone, and it leaves the Comptroller free, under the National Bank Act, to determine for himself whether the proposed bank is *lawfully entitled to commence banking* (12 U.S.C. 27).

Under these circumstances, we submit that the cases relied on by the Comptroller, at pages 29-32 of his brief,

are not applicable here. First, all of those cases involved situations where Congress had provided adequate administrative proceedings *before the Government agency directly involved in the suits sought to be commenced, and such proceedings were either ignored or pending incomplete before that agency.* Here, the Comptroller admits, at page 38 of his brief:

> "There is . . . *no provision* for an administrative hearing and no authorization for competitors to appear before the Comptroller; his decisions are made *ex parte* after his own informal investigation . . . . In deed there is no administrative record of the evidence and arguments upon which the Comptroller bases his action."

Thus, wholly unlike the situations in *Far East Conference* v. *United States*, 342 U.S. 570; *Myers* v. *Bethlehem Corp.*, 303 U.S. 41; *Callanan Road Co.* v. *United States*, 345 U.S. 507; *FPC* v. *Colorado Interstate Gas Co.*, 348 U.S. 492; *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320; *Seattle* v. *Beezer*, 376 U.S. 224; and other similar cases relied on by the Comptroller—there were no administrativce proceedings before the Comptroller in this case for respondents to exhaust or for respondents collaterally to attack.

A fortiori, respondents' sole effective remedy against the licensing of Whitney Jefferson is in the action before this Court. No such relief is available in the Fifth Circuit, where neither the Comptroller nor Whitney Jefferson are parties and where the Comptroller's right unlawfully to license the opening of the illegal banking operation under the National Bank Act is not directly in issue.

D. There Is Absolutely No Merit to the Comptroller's Contention That Congress Required the Issues Here Raised To Be Presented to and Settled By the Federal Reserve Board.

At page 20 of his brief, the Comptroller urges this Court to hold that all of the issues presented by this case under the National Bank Act should have been presented to and settled by the Federal Reserve Board. The short answer to that contention is (1) the Comptroller has pointed to no law so providing; (2) *the Federal Reserve Board, in the case at bar, specifically ruled that it will not pass on any "alleged violation of provisions of the National Bank Act, which is administered by the Comptroller of the Currency, an official of the United States Treasury Department"* (R. 168); and (3) no statutory hearing, such as that contemplated by 12 U.S.C. 1842(b), was ever held by the Board in Louisiana—the necessity for such hearing having been negated by the Comptroller's own approval of the program as aforesaid.[70]

In essence, therefore, as stated by the Board itself, it has no jurisdiction over the licensing of banks under the National Bank Act, and it has no obligation, under 12 U.S.C. 27 to determine whether an organization such as Whitney Jefferson (which has never even been before it) is lawfully entitled to commence business.

In this regard, two of the attorneys for the Comptroller in this case,[71] who have also simultaneously acted for the Board in the Fifth Circuit proceedings,

---

[70] As stated before, the sole proceeding before the Board, to which respondents were not invited or subpoenaed, was an informal acceptance of views.

[71] Messrs. Hollander and Rose.

stated in a brief filed by them in the latter proceedings in May, 1963,—at page 57 of that brief:

> "From the foregoing legislative history, it seems to us clear that Congress intended that the Board pass upon applications for the acquisition or establishments (sic) of subsidiaries *without regard to State prohibitions against branch banking.* The language of the Act clearly reveals this intent." (Italics supplied).

And, at page 71:

> "None of the issues before this Court have been decided by the District Court for the District of Columbia *and the only issue resolved by that court is not before this Court.*" (Italics supplied).

In fact, the Board, like the Comptroller here, has repeatedly urged the Fifth Circuit to dismiss the proceedings there "for lack of jurisdiction."

In essence, therefore, the Government has told the Fifth Circuit that respondents' remedy is against the Comptroller, while here we are told that respondents' sole remedy rests in the Fifth Circuit proceedings against the Board. This, we submit, is hardly a suitable position to advance before a court of equity.

Finally, we suggest most strenuously that, in any event, the contention that respondents allegedly failed to exhaust their administrative remedies *before the Board* under the Bank Holding Act belongs *exclusively to the Board and it cannot be appropriated by petitioner Saxon in this case.* Indeed, his assertion of that contention here is itself a collateral attack upon the jurisdiction of the Fifth Circuit in a completely separate case, pending between different parties and involving entirely different matters.

CONCLUSION

The decisions of both the Court of Appeals and the District Court should be affirmed by the Supreme Court of the United States.

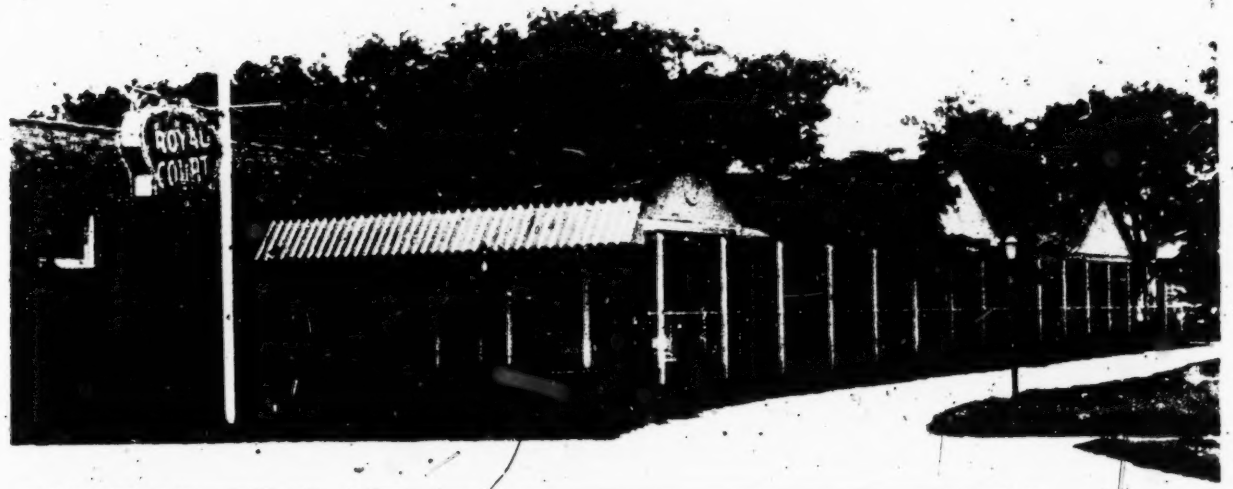
Respectfully submitted,

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"Alleged Temporary Location" of Whitney National Bank in Jefferson Parish, as photographed on July 3, 1962, 24 days after this action was commenced.



"Alleged Permanent Location" of Whitney National Bank in Jefferson Parish, as photographed on July 3, 1962, 24 days after this action was commenced.

APPENDIX B

ORIGINAL

WHITNEY NATIONAL BANK
IN JEFFERSON PARISH
JEFFERSON PARISH LA

NUMBER

Pay to the order of $

Dollars

AUTHORIZED SIGNATURE

19 No

WHITNEY NATIONAL BANK 64-317/650
IN JEFFERSON PARISH
JEFFERSON PARISH, LA

PAY TO THE ORDER OF $

DOLLARS

SPECIMENS OF PROPOSED CHECKS TO BE USED BY WHITNEY NATIONAL BANK IN JEFFERSON PARISH

WHITNEY NATIONAL BANK

IN JEFFERSON PARISH

JEFFERSON PARISH, LA.

JAMES GILLY, JR.
PRESIDENT

SPECIMEN OF LETTERHEAD TO BE USED BY WHITNEY NATIONAL BANK IN JEFFERSON PARISH

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

WHITNEY NATIONAL BANK IN JEFFERSON PARISH,
Petitioner

VERSUS

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL.

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY,
Petitioner

VERSUS

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENT. LOUISIANA STATE BANK COMMISSIONER

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INDEX

	Page
Questions Presented	1
Counter-Statement of the Case	2
Summary of Argument	9
Argument:	
I. The Whitney Plan Is Unlawful Under the Express Provisions of Section 36(c) of the National Bank Act (12 U.S.C. 36) and Title 6, Section 54 of the Louisiana Revised Statutes	10
II. Act 275 of 1962, Enacted Pursuant to a Reservation of Power and Jurisdiction to the States by the Congress of the United States in the Federal Bank Holding Company Act (12 U.S.C. 1846) Makes it Unlawful for the Whitney National Bank in Jefferson Parish, a Wholly Owned Subsidiary of a Louisiana Incorporated Bank Holding Company, to Commence Banking Business and the Comptroller of the Currency Has No Discretion to Issue a Certificate of Authority Authorizing it to Commence an Unlawful Operation	19
III. The State Bank Commissioner of Louisiana Has Standing to Challenge the Unlawful Action of the Comptroller of the Currency in the Case at Bar	32
Conclusion	37

CITATIONS

CASES:

Alabama Power Co. v. *Federal Power Commission*, 68 App. D.C. 132, 94 F. 2d 601	17
All America Airways, Inc. v. *Cedarhurst*, C.C.A. 2, 1953, 201 F. 2d 273	37
Braeburn Securities Corp. v. *Smith*, 15 Ill. 2d 55, 153 N.E. 2d, 806, appeal denied 359 U.S. 311	20, 21, 28, 29

Page

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Commercial State Bank v. *Gidney*, 174 F. Supp. 770, affd. 108 App. D.C. 37, 278 F. 2d 871 (1960) 24, 28, 34
Corn Products Refining Company v. *Benson*, (C.C.A. 2) 232 F. 2d 554 17
Douglas v. *Kentucky*, 168 U.S. 488 30
East N.Y. Sav. Bank v. *Hahn*, 326 U.S. 230 ..... 30, 31
Ferguson, Attorney Gen. of Kansas v. *Skrupa*, 372 U.S. 726 (1963) 31
First National Bank of Billings v. *First Bank Stock Corp.*, (C.C.A. 9, 1962) 306 F. 2d 937 ..... 16, 17
Fitzpatrick v. *Commonwealth Oil Co.*, (C.C.A. 5) 285 F. 2d 726 17
Guaranty Trust Co. v. *West Va. Turnpike Comm.*, 109 F. Supp. 286 36
Home Bldg. & Loan Assn. v. *Blaisdell*, 290 U.S. 398 30
Metropolitan Holding Company v. *Snyder*, 79 F. 2d 263, 267 17
Millheim v. *Moffat Tunnel Improvement Dist.*, 262 U.S. 710, 716-717 (1923) 21
National Bank of Detroit v. *Wayne Oakland Bank*, 252 F. 2d 537, 540 (6th Cir. 1958) 18
Ohio Tank Car Company v. *Keith Railway Equipment Company*, 148 F. 2d 4, 6 17
Opinion of the Justices, 151 A. 2d 236 (N.H. 1959) 20, 21, 28, 29
People of California v. *United States*, C.C.A. 9, 1950, 180 F. 2d 596 36
Schenley Distillers Corp. v. *United States*, 326 U.S. 432, 437 (1946) 17
Securities & Exchange Comm. v. *U. S. Realty & Improvement Co.*, 310 U.S. 434 (1960) 37
Stone v. *Mississippi*, 101 U.S. 814 30
Veix v. *Sixth Ward Building & Loan Assn.*, 310 U.S. 32 30
Wisconsin Bankers Association v. *Federal Home Loan Bank Board*, 190 F. Supp. 90, 94 (1960), affd. 294 F. 2d 714 (D.C. App., 1960), cert. denied, 368 U.S. 938 34

Page

STATUTES:

Banking Act of 1933 (Act of 6/16/33, c. 89; 48 Stat. 189)
12 U.S.C. 36c 2, 3, 8, 10, 11, 13, 19, 24, 28, 36, 37

Federal Bank Holding Company Act of May 9, 1956, c. 240, 70 Stat. 133
12 U.S.C. 1841 22
12 U.S.C. 1842(d) 26, 27
12 U.S.C. 1846 .....5, 8, 9, 21, 27, 28, 31

Rule 24 of the Federal Rules of Civil Procedure 34

Louisiana Act 275 of 1962 .....2, 6, 7, 8, 9, 10, 19, 21, 28, 29, 30, 32, 34, 35, 36

Louisiana Rev. St. 6:54, 328 .....10, 36

Congressional Record Citations:
84th Cong., 1st Sess., p. 8021 22
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84th Cong., 2d Sess., pp. 6752, 6753 25
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U.S. Code and Congressional News, 1956 p. 2493 25

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

Nos. 26 and 30

WHITNEY NATIONAL BANK IN JEFFERSON PARISH,
Petitioner

VERSUS

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL.

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY,
Petitioner

VERSUS

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENT, LOUISIANA STATE BANK COMMISSIONER

QUESTIONS PRESENTED

1. Was the Court of Appeals correct in holding that the scheme of reorganization devised by the Whitney National Bank of New Orleans, under which banking offices would be organized and opened in

nearby Jefferson Parish, Louisiana, violated the prohibitions against branch banking contained in 12 U.S.C. 36(c) and that the Comptroller of the Currency was properly enjoined from issuing a certificate of authority for such operation to begin business in Jefferson Parish, Louisiana?

2. Was the District Court correct in ruling that Act 275 of the 1962 Legislature, the Louisiana State Bank Holding Company Act, is constitutional; that said Act prohibits a wholly owned subsidiary of a Louisiana-incorporated Bank Holding Company, from opening for business; and that the Comptroller of the Currency has no discretion to issue a certificate of authority that will permit same to open and operate in a manner prohibited by law?

3. Does the Louisiana State Bank Commissioner, the officer charged with the responsibility of administering the banking laws of the State of Louisiana, have standing to intervene herein to challenge the unlawful actions of the Comptroller of the Currency in issuing a certificate of authority to license an operation in violation of both State and Federal law?

COUNTER-STATEMENT OF THE CASE

The State Bank Commissioner of Louisiana adopts the counter-statement of the case contained in the brief of the other respondents herein, Bank of New Orleans and Trust Company, et al., with the following additions:

Respondent is The State Bank Commissioner for the State of Louisiana, the officer charged with the responsibility of administering the banking laws of the State. As such, Respondent is vitally interested

in the issues involved here because the Whitney scheme to establish additional banking facilities in adjacent Jefferson Parish, if allowed to materialize, will have a direct and adverse effect on the State of Louisiana, its banking laws, and all State chartered banking institutions under the supervision of the State Banking Department.

The State of Louisiana has always been opposed to monopoly, undue concentration and destructive, unfair competition in its banking industry (J.A. 162, 163). The public policy of this State in this respect has been preserved and fostered for many years by statutes, both Federal and State, which make it unlawful for either national or state banks in Louisiana to open branch offices or additional banking facilities in the State at locations beyond the limits of the parish (County) in which their main offices are located. Because of this long standing legal prohibition against inter-parish banking and the announced public policy of the State, Louisiana's dual banking system has been preserved and independent unit banks have prospered and grown.

Petitioners readily concede in their briefs before this Court that under the existing provisions of the National Bank Act (12 U.S.C. 36[c]) and Title 6, Section 54, of the Louisiana Revised Statutes, Whitney National Bank of New Orleans (hereinafter called Whitney-New Orleans) is absolutely prohibited from opening and operating any banking offices or facilities beyond the Parish of Orleans where Whitney's main office is located (Whitney Brief, p. 4; Saxon Brief, p. 3). Faced with these prohibitions against direct branching, Whitney-New Orleans devised a plan, with the assistance and approval of the Comptroller of the

Currency, to evade and circumvent the State and Federal laws restricting branch banking and set about to accomplish indirectly that which it was prohibited from doing directly, i.e., establish banking facilities in Jefferson Parish (J.A. 42, 43, 277, 278). In order to accomplish its objective, Whitney-New Orleans first created through its own officers and directors and with $350,000 of its own funds, a Louisiana Bank Holding Company (hereinafter called Whitney Holding), which in turn, by means of an intricate corporate maneuver and merger, acquired complete ownership of Whitney-New Orleans. Whitney-New Orleans then provided $650,000 of its funds to Whitney Holding with which Whitney Holding, a mere conduit for the transfer of funds, proposed to establish a wholly owned and controlled banking facility in Jefferson Parish (hereinafter called Whitney-Jefferson). The detailed chronology of the Whitney plan is set forth at J.A. 446, 461 and 462.

The Whitney plan represents the first time that a bank doing business in the State of Louisiana has ever attempted to frustrate the branch banking laws and public policy of the State through the subterfuge of a holding company. Additionally, respondent believes that this is the first time that a Comptroller of the Currency has assisted a national bank in formulating a plan admittedly designed for the express purpose of evading State and Federal laws prohibiting interparish banking. If the Whitney plan is allowed to materialize it will only be a question of time before every national bank in the country will seek to take advantage of this scheme to evade branching restrictions and as a result the protection historically afforded to the independent unit bank by the National

Bank Act against monopolistic control and concentration in the banking industry would no longer exist.

When it became apparent that the Comptroller of the Currency was going to license this clear-cut circumvention of the law, an emergency situation arose in the Louisiana banking industry. The State Bank Commissioner immediately requested an opinion from the Attorney General of Louisiana as to the legality of Whitney's scheme to establish additional banking facilities in Jefferson Parish. The Attorney General ruled that "a bank holding company may not circumvent the branch bank laws of our State by the acquisition of a controlling interest in a subsidiary which is located in a Parish other than the domicile of its parent company" (J.A. 163, 164, 289).

The instant litigation was instituted on June 9, 1962 by three Louisiana state banks against the Comptroller of the Currency in order to prevent the Comptroller from unlawfully issuing a certificate of authority to the proposed Jefferson Parish bank and sought to obtain: (a) a declaratory judgment to the effect that a combination of Federal and State law make it unlawful for the Comptroller to issue a final certificate of authority authorizing Whitney-Jefferson to open in Jefferson Parish as a subsidary of Whitney Holding, and (b) a permanet injunction restraining the Comptroller of the Currency from issuing such certificate of authority.

In the meantime, the Louisiana Legislature, pursuant to the jurisdiction and powers reserved to the States under 12 U.S.C. Section 1846, the Federal Bank Holding Company Act, passed a State Bank Holding Company Act (Act 275 of 1962; L.S.A.-R.S. 6:1001,

et seq.) to meet this emergency and to forestall bank holding companies from any further attempt to defeat and circumvent Louisiana's long standing public policy and law against monopolistic branch banking. The emergency confronting the State banking industry was rendered particularly acute by virtue of the fact that Whitney-New Orleans, the proponent of the holding company scheme to accomplish inter-parish banking, is the largest bank by far in the entire State and already controls a major portion of the available banking business in the areas of Louisiana involved (J.A. 99, 275).

Louisiana Act 275 of 1962 was overwhelmingly passed by both Houses of the Legislature. It was designated emergency legislation by the Governor and thus became effective immediately on July 10, 1962. Section 1 of the Act sets forth clearly the policy of this state:

> "It is declared to be the policy of this State to protect and to foster the growth of the independent unit bank and institution whose ownership and origins are grounded in the local community and whose activities are bound up with local economic and social organizations; to prevent the undesirable concentration of control in the banking field to the detriment of the public interest; to insure effective competition among all banking institutions; and, to accomplish these objectives by prohibiting the formation of new holding companies and the acquisition of control by whatever means of additional banking institutions by existing bank holding companies and their subsidiaries."

Section 3 of Act 275 provides, in part:

> "It shall be unlawful . . . (5) for any bank holding company or subsidiary thereof to open for business any bank not now open for business, whether or

not, a charter, permit, license or certificate to open for business has already been issued . . ."

On July 10, 1962, the effective date of Act 275, Whitney-Jefferson, the proposed subsidiary of the holding company, had not yet opened for business because the United States District Court for the District of Columbia had already granted a preliminary injunction enjoining the Comptroller of the Currency from issuing the certificate of authority which would authorize it to commence banking business (J.A. 221).

After passage of Act 275, petitioners immediately attacked the Act contending: (1) that it was not applicable to Whitney-Jefferson, a national bank; and (2) that if the Act were held to be applicable to said bank, then it was unconstitutional. All parties promptly moved for summary judgment and The State Bank Commissioner, with the consent of all parties, moved to intervene as a party plaintiff pursuant to Rule 24 of the Federal Rules of Civil Procedure (J.A. 346, 347). It was stipulated that the District Court should properly determine, in addition to the other issues already raised by the pleadings, whether Act 275 of 1962 effectively precluded the Comptroller from issuing a certificate to Whitney-Jefferson (J.A. 384, 385, 386).

After submission of briefs and extensive oral argument, the District Court granted respondents' cross-motions for summary judgment (J.A. 434-438, 444-450) and permanently enjoined the Comptroller of Currency from issuing or delivering a certificate of authority to Whitney National Bank in Jefferson Parish, or to any persons or corporations in active concert or participation therewith (J.A. 450-452). Judge McLaughlin held that Act 275 of 1962 was con-

stitutional, having been enacted pursuant to the powers and jurisdiction reserved to the states by the Federal Bank Holding Company Act, 12 U.S.C. § 1846; that Act 275 of 1962 is directly applicable to Whitney-Jefferson, a wholly owned subsidiary of a Louisiana incorporated bank holding company; that said statute makes it unlawful for Whitney-Jefferson to commence the business of banking in Louisiana; and that the Comptroller of the Currency has no discretion to issue a certificate of authority to commence a banking business in a manner prohibited by law (J.A. 448-450).

Petitioners Whitney and Saxon each filed separate appeals which were later consolidated.

On August 14, 1963 the United States Court of Appeals for the District of Columbia Circuit affirmed the decision of the District Court on different grounds and held that the elaborate and ingenious scheme of reorganization devised by Whitney-New Orleans for the establishment of additional banking facilities in Jefferson Parish was tantamount to the establishment of a branch bank and therefore prohibited by 12 U.S.C., § 36(c) (J.A. 454-477). Having disposed of the case under 12 U.S.C. 36, the Court deemed it unnecessary to consider whether Act 275 of 1962 of the Louisiana Legislature also prohibits the opening of the Jefferson Parish Bank.

SUMMARY OF ARGUMENT

I

The announced and sole purpose of the Whitney-New Orleans plan of reorganization was to enable Whitney to establish wholly owned banking facilities in nearby Jefferson Parish. This plan constitutes a clear violation of both State and Federal law which has historically prohibited inter-parish branch banking in Lousiana. The use by Whitney of a holding company, organized by it with its own capital funds, to establish banking facilities in a prohibited area is an attempt to accomplish indirectly that which it is prohibited from doing directly and the Court of Appeals correctly ruled that the corporate veil should be pierced to reveal the proposed Whitney subsidiary as a forbidden branch.

II

That State of Louisiana, pursuant to the express powers reserved to it under the Federal Bank Holding Company Act (12 U.S.C. 1846) enacted a State Bank Holding Company Act (Act 275 of 1962) which makes it unlawful for any bank holding company or subsidiary thereof to open for business any bank not already opened for business. The proposed holding company subsidiary in Jefferson Parish had not opened for business on the effective date of the Act, and consequently under the explicit prohibition contained therein can never open for business. The Louisiana Bank Holding Company Act is clearly constitutional and directly applicable to Whitney Holding and Whitney Jefferson. Accordingly, the District Court correctly held that the Comptroller

had no discretion to issue a certificate of authority which would authorize the commencement of banking business prohibited by law.

III

The State Bank Commissioner intervened in this action pursuant to the provisions of Rule 24 of the Federal Rules of Civil Procedure, and the appellants formally consented to his intervention. The District Court thereupon entered an Order making the Commissioner a party plaintiff. Appellant Comptroller, under these circumstances, cannot now be heard to complain that the Commissioner is without standing. Furthermore, the Commissioner clearly has standing in this action, where both petitioners and respondents are litigating with regard to Louisiana Act 275 of 1962 and Louisiana Rev. Statutes 6:54, which, by law, are to be administered and enforced by the Commissioner.

ARGUMENT

I.

The Whitney Plan Is Unlawful Under the Express Provisions of Section 36(c) of the National Bank Act (12 U.S.C. 36) and Title 6, Section 54 of the Louisiana Revised Statutes.

There can be no doubt about the fact that the Whitney plan was confected solely to enable Whitney-New Orleans to accomplish indirectly that which it was prohibited from doing directly, i.e., establish additional banking facilities in Jefferson Parish. As stated by the Court of Appeals in the instant case:

> "There was actually no pretense about the matter: Whitney of New Orleans frankly proposed to evade the statutes by establishing through the holding company arrangement an office in East

> Jefferson Parish which it would manage and control."

The Federal Reserve Board in its written statement in support of its approval of Whitney's application to become a bank holding company recognized the Whitney program for what it is. The Board stated:

> "The stated purpose of the proposed holding company system is to enable an organization centered about Whitney of New Orleans to provide banking services, not only through its existing twelve offices within the City of New Orleans, but also through offices in The East Bank of Jefferson Parish. The holding company system will be under the direction of the present executive management of Whitney-New Orleans; in fact, for present purposes, the holding company itself is simply the means by which Whitney banking offices may be established and operated in East Bank." (J.A. 100)[1]

The President of the Whitney National Bank of New Orleans was quite candid in his testimony before the Federal Reserve Board in January of 1962 when he, in effect, admitted that the sole objective of the

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[1] It is interesting to note that the Federal Reserve Board, although frankly admitting that the entire Whitney Plan was devised solely to enable the Whitney organization to move into Jefferson Parish, took the position that any criticism of the plan as being unlawful under the National Bank Act should be answered by the Comptroller and not the Board. In this respect, the Board ruled that such criticism relates "largely to an alleged violation of provisions of the National Bank Act, which is administered by the Comptroller of the Currency, an official of the United States Treasury Department." (J.A. 168, 286, 287). The Comptroller, however, when asked to comment on such by the Board refused to do so. (J.A. 424, 425, 426). It is therefore submitted that petitioner's argument which suggests that any attack upon the Whitney plan as a violation of Section 36(c) can only be brought before the Federal Reserve Board is wholly without merit.

plan of reorganization was to evade the restrictions against branching and to permit the Whitney to enter Jefferson Parish. Mr. Berry stated:

> *"Under present laws in our State, the Whitney is not permitted to establish branches outside the Parish of Orleans.* (J.A. 64) . . .
>
> *"The management of the Whitney National Bank has been studying and weighing alternative methods of entering Jefferson Parish . . .* and to participate in the further growth of that area. (J.A. 65) . . .
>
> *"The officers of the Whitney National Bank determined in 1960 that the holding company was the proper solution, provided we could put the ownership of the present Whitney National Bank of New Orelans stock into such a company and, by the use of Whitney assets, establish a bank in Jefferson Parish,* which would likewise be fully owned by the holding company. (J.A. 65)
>
> "The Comptroller of the Currency has concurred in a program which has the effect of putting the ownership of the present Whitney National Bank stock into the Whitney Holding Corporation, through this Crescent City National Bank that was mentioned, and to the establishment of the Whitney National Bank in Jefferson Parish *with funds from the present Whitney National Bank,* the stock of which would be also owned by the Holding Company. (J.A. 65) . . .
>
> *"The Whitney National Bank of New Orleans will continue in exactly the same form as it is now except for the withdrawal of $650,000 in capital funds which will be put into the Jefferson Parish Unit as capital for it."* (J.A. 68) (Emphasis supplied)

Of course, this plan was not devised without the assistance of the Comptroller of the currency who as

stated by the Court of Appeals "was not gulled by the ruse" and fully recognized the objective sought by Whitney. As a matter of fact, it is evident from the affidavit filed herein by the Comptroller (J.A. 42, 43) that the Office of the Comptroller actually furnished advance advice and guidance to the Whitney as to how it might successfully evade the restrictions against branch banking and establish additional banking facilities in Jefferson Parish.

Petitioners attempt to justify the Whitney plan of reorganization and its objective by contending that the branching restrictions contained in the National Bank Act do not apply to a bank holding company. Obviously, the position taken by petitioners is untenable because otherwise every national bank in the country could evade branch banking laws merely forming a bank holding company through which it could establish and capitalize subsidiary banks without geographical limitation. If this were permitted, Section 36(c) of the National Bank Act would certainly become a "dead letter". (J.A. 260). While it may be true that Congress enacted the Bank Holding Company Act of 1956 to control and regulate the formation and growth of bank holding companies, this does not mean that a subsidiary of a bank holding company can never be considered a forbidden branch within the meaning of Section 36(c) of the National Bank Act. In 12 U.S.C., § 36, Congress gave a broad meaning to the word "branch":

> "(f) The term branch as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any state . . . at which deposits are received, or checks paid, or money lent."

Clearly, this definition would include the proposed banking facility in Jefferson Parish as it was characterized by the President of the Whitney-New Orleans in a letter to the stockholders dated October 28, 1961 (J.A. 32, 33):

> "We are firmly convinced, after careful consideration of the alternatives, that your common ownership of all of Whitney National Bank of New Orleans stock and all of the stock of a Whitney National Bank in Jefferson Parish by a holding company to be owned by you is the *soundest method of pooling all of the deposits of all of our customers and of our capital funds for their use* and for the development of this community. *From the depositors point of view, those in the smaller bank will be assured of the same management which directs the larger one without possibility of interruption. They will be assured of access to the large loan limits of the combined banks. They will have the security which arises out of the fact that the large and the small bank have identical ownership as well as management. . . .*
>
> "Under the holding company approach the relationship is completely owned by the stockholders of the holding company who will be all the present stockholders of the Whitney National Bank and their successors.
>
> "*By reason of the common ownership of the two banks in a holding company there can arise no conflict of interest between them as there can be affiliated banks.* There will be no minority stockholders to be effected.
>
> "From the customer point of view there will be no conflict of interest arising out of the manner in which the customer sees fit to divide his business between the commonly owned banks in the

two parishes. He will have the full benefits of the relationship of a large bank and its officers.

"Because of the permanent relationship between the large and the smaller bank, the smaller one can operate safely with a smaller capitalization. *The corporate identity of the 78 year old Whitney National Bank, Whitney prestige and assets values inherent therein, is fully preserved under the holding company procedure, as is your undiluted ownership thereof.*" (J.A. 33)

The Court of Appeals in the instant case correctly described the Whitney scheme as "a boot strap operation by which Whitney-New Orleans, using its own funds in corporate maneuvering, seeks to establish a branch in prohibited territory".

The arrangement sought to be adopted by Whitney is not typical of a normal transaction by which a bank holding company acquires a subsidiary bank with capital furnished by its investors. On the contrary, the Whitney scheme involves a situation wherein a single bank, for the admitted and announced purposes of evading state branching laws, sets out to capitalize a holding company with its own funds, and, by using said holding company as a conduit, to furnish the initial capitalization for a subsidiary bank in an adjoining parish.

It is "the nature of the arrangement, and not the label applied to it" which "determines the character of the relationship between two banking institutions." (J.A. 471). The proposed bank in Jefferson Parish cannot be considered in the nature of an "affiliate" arrangement as was approved by the District of Columbia Circuit in *Camden Trust Co.* v. *Gidney*, 301

F.2d 521 (1962). Unlike the Whitney scheme, the *Camden* situation involved the investment of fresh new capital by individual stockholders. This type of arrangement was specifically rejected by the Whitney organization because it felt that such would not permit complete control by the Whitney National Bank. This was bluntly stated by the President of the Whitney Bank:

> "... We have been unwilling to go with an affiliate which we couldn't hold on to necessarily.
>
> "It doesn't become a part of our organization; it is just sort of hanging loosely. You have these conflicts of interest and it is awkward.
>
> "The thing that makes this [holding company approach] interesting to us is the ability to approach the branch phase of it . . ." (J.A. 74)

What the President of the Whitney Bank was in effect stating is that Whitney was seeking the "unitary type of operation" which the Ninth Circuit in the case of *First National Bank in Billings* v. *First Bank Stock Corporation*, 306 F.2d 397 (9th Cir. 1962), described as characteristic of branch banking.

The Comptroller of the Currency was apparently satisfied to rely on the mere form of the Whitney transaction and to disregard the true nature of it. However, the Court of Appeals was not so inclined and felt compelled to "pierce the corporate veil" to expose the subterfuge.

It is a well established principle of law that courts may disregard corporate entities or devices admittedly created to circumvent or evade the prohibitions of federal statutes, and the courts have done so on numerous

occasions. See: Fletcher, 1 Cyclopedia Corporation, § 45; *Schenley Distillers Corp.* v. *United States*, 326 U.S. 432, 437 (1946); *Alabama Power Company* v. *Federal Power Commission*, 94 F.2d 601, 608; *Ohio Tank Car Company* v. *Keith Railway Equipment Company*, 118 F.2d 4, 6; *Metropolitan Holding Company* v. *Snyder*, 79 F.2d 263, 267; *Fitz-Patrick* v. *Commonwealth Oil Company*, 285 F.2d 726, 730.

The foregoing rule was aptly stated by the Court of Appeals for the Second Circuit in *Corn Products Refining Company* v. *Benson*, 232 F.2d 554, 465 (1956):

> "The existence of a separate corporate entity should not be permitted to frustrate the purpose of a federal regulatory statute . . . Corporate entity may be disregarded when failure to do so would enable the corporate device to be used to circumvent a statute . . ."

The fact that the particular corporate entity is a bank holding company does not prevent a court from examining the true nature of the relationship between said holding company and its subsidiary to determine whether or not the subsidiary is in reality a forbidden branch. This was stated unequivocably by the court in *First National Bank of Billings* v. *First Bank Stock Corporation*, supra, and the following language is particularly apposite to the instant case:

> "We do not agree with appellees that the fact that the two banks are separate corporate organizations demonstrates conclusively that one is not a branch of the other. In the banking field, as elsewhere, courts have power to 'pierce the corporate veil' when the realities require it."

The "realities" of the instant case demand that the Court disregard the corporate subterfuge created by

Whitney-New Orleans and that the proposed bank in Jefferson Parish be classified as a forbidden branch.

An additional issue at stake here is the long-established national policy of protecting and fostering the dual banking system by maintaining competitive equality between National and State Banks. This competitive equality is guaranteed by Section 36 of the National Bank Act, which adopted state law as a measuring stick for determining where national banks might establish branches. *National Bank of Detroit* v. *Wayne Oakland Bank*, 252 F.2d 537, 540 (6th Cir. 1958) Respondents are State chartered banks prohibited by law from opening branch banks or other banking facilities beyond the limits of the parish in which their main offices are located, either directly or indirectly through the device of a holding company financed by them. The Attorney General of Louisiana has construed the branch banking provisions of Louisiana law, which the Comptroller must recognize as a part of the Federal law restricting branching by national banks, as precluding a bank holding company from acquiring a controlling interest in a subsidiary which is located in a parish other than the domicile of the parent company. (J.A. 164). Consequently, a State bank, similarly situated to the Whitney National Bank of New Orleans could not utilize the procedure which Whitney has attempted to follow to secure an office in Jefferson Parish. Any application submitted by a State bank in the form of a holding company or otherwise would necessarily have to be rejected as an attempt to establish a forbidden branch. The Comptroller in administering the Federal statute is required to follow the construction which the State of Louisiana has given to its own laws regulating branch banking. If the Comptroller is permitted to disregard the laws of a state

pertaining to branch banking, the competitive equality between state and national banks which Congress has consistently sought to preserve will be destroyed. Respondent therefore submits that the Court of Appeals correctly concluded that the Comptroller was properly enjoined from issuing a certificate of authority to Whitney-Jefferson on the grounds that the opening of said bank is prohibited by 12 U.S.C., § 36.

II.

Act 275 of 1962, Enacted Pursuant to a Reservation of Power and Jurisdiction to the States by the Congress of the United States in the Federal Bank Holding Company Act (12 U.S.C. 1846) Makes It Unlawful for the Whitney National Bank in Jefferson Parish, a Wholly Owned Subsidiary of a Louisiana Incorporated Bank Holding Company, to Commence Banking Business and the Comptroller of the Currency Has No Discretion to Issue a Certificate of Authority Authorizing It to Commence An Unlawful Operation.

In granting respondents' cross-motions for summary judgment and permanently enjoining the Comptroller of the Currency from issuing or delivering a certificate of authority to the Whitney-Jefferson, Judge McLaughlin of the District Court held that Act 275 of 1962 was directly applicable to Whitney-Jefferson, a wholly owned subsidiary of a Louisiana incorporated bank holding company; that such statute was constitutional; that the said statute makes it unlawful for Whitney-Jefferson to commence business in Jefferson Parish; and that consequently the Comptroller of the Currency has no discretion to issue a certificate to license an operation prohibited by law (J.A. 444-450). Counsel submits that the District Court's decision is eminently correct in view of the fact that the constitutionality of similar state statutes has been upheld by

all of the authorities which have considered the precise question, including the United States Supreme Court. See: *Braeburn Securities Corporation* v. *Smith*, 15 Ill.2d 55, 153 N.E.2d 806 (1958); *Opinion of the Justices*, 151 A.2d 236 (1959).

In the *Braeburn* case, supra, the Court had under consideration the Illinois Bank Holding Company Act of 1957 and the Illinois Supreme Court upheld the applicability of the Act to national banks. The Court stated at 153 N.E.2d 808:

> "The . . . 1957 Act . . . clearly manifests a legislative determination that future ownership and control of banks in Illinois by bank holding companies must be stopped . . .
>
> ". . . Branch banking in Illinois has been prohibited for many years . . .
>
> "It is clear that this prohibition could be circumvented and indirect branch banking result if, through ownership of bank stock, one or more bank holding companies could control several banks. Branch banking can be accomplished by one bank operating at several locations or by one company owning and controlling several banks variously located.
>
> "In 1956, Congress adopted legislation regulating bank holding companies (12 U.S.C.A. § 1841, et seq.); and provided, among other things, that its action should not impair the then jurisdiction of the States, and further specifically provided that the administration of the Federal Act should be within the confines of State law, if any. The Illinois legislation, as well as legislation in New York, new Jersey, Pennsylvania and Indiana, is an acceptance of the suggestion implied in the Federal Act that the States should act if, *as a matter of*

> *policy, bank holding company legislation more restrictive than the Federal Act was desired by the States. Further, it seems clear that such State legislation could be applicable to national as well as State banks, since the Congress did not manifest an intent to pre-empt the legislative field."*

An appeal in the *Bracburn* case was dismissed for want of a substantial federal question by the United States Supreme Court, 359 U.S. 311 (1959), an action even stronger than judicial affirmance. *Milheim* v. *Moffatt Tunnel Improvement Dist.*, 262 U.S. 710, 716 (1923).

In 1959 the Justices of the Supreme Court of New Hampshire considered the constitutionality of a proposed bank holding company in New Hampshire, which, like the Illinois statute, defined "bank" as including national banks. The Court, in *Opinion of the Justices*, supra, held that state legislation pertaining to bank holding companies could be applicable to national as well as state banks, since Congress had not manifested an intention to pre-empt the legislative filed. The Court went on to state:

> "Furthermore at least seven states (Illinois, New York, Indiana, Kansas, Pennsylvania, and Massachusetts) have enacted legislation in this field since Congress passed the Bank Holding Company Act of 1956. It is our opinion based on the wording of the Act, its legislative history and the facts as enumerated above that House Bill No. 272 would not conflict with any federal statute."

It is difficult to perceive how Congress could have more clearly reserved to the State of Louisiana the right to enact Act 275 of 1962 than by the pronouncement contained in 12 U.S.C. 1846, the Federal Bank

Holding Company Act. That Section, boldly entitled "Reservation of Rights to States", provides:

> "The enactment by Congress of this Chapter shall not be construed as preventing any state from exercising such powers and jurisdiction which it may now or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof."

Congress specifically defined the word "banks" to include "any national banking association or any state bank"; the term "bank holding companies" to include "any company"; and "subsidiaries" to mean also "any company" with the specified stock relationship to a holding company. 12 U.S.C. 1841(a), (c), and (d). Thus, under the precise language of the Federal Statute itself, state jurisdiction was fully preserved over bank holding companies, such as Whitney Holding Corporation, a Louisiana Corporation, and over its subsidiary the proposed Whitney-Jefferson.

Congress passed the Bank Holding Company Act to regulate and control bank holding companies, not to unleash them from any and all restraints, as petitioners herein seem to contend. The legislative history of the Bank Holding Company Act of 1956 shows clearly that Congress was convinced that bank holding companies were thwarting national banking policy; that they posed a threat to competition in banking; and that immediate controls were urgently required. The Chairman of the Banking and Currency Committee described the purpose of the Act as follows (Congressional Record, 84th Congress, 1st Session, Page 8021):

> "The holding company was organized for the purpose of circumventing the banking law. The banking laws in the 1920's generally did not permit any branches. There were no branches of national

> banks before 1927. Through the bank holding company device they circumvented the branch banking laws and accomplished something the branch banking laws had attempted to prevent . . . We are now trying to rectify that condition."

Representative Johnson of Wisconsin joined in the House debate on the Act, and he stated (Congressional Record, 84th Congress, 1st Session, Page 8176):

> "I believe this legislation is essential to prevent a most dangerous type of monopoly, the banking monopoly. In my opinion, the bank holding company device leads to uncontrolled branch banking resulting in an undesirable concentration of economic power."

The following excerpts from House Report No. 609 leading up to the passage of the Bank Holding Company Act demonstrates the purpose of the act and the intent of Congress:

> "Evidence developed during the hearings has convinced your committee that bank holding companies are not in accord with the very precepts upon which our banking system rests. The United States early in its history, it should be recalled, adopted a democratic ideal of banking. Other countries, for the most part, have preferred to rely on a few large banks controlled by a banking elite. There has developed in this country, on the other hand, a conception of the independent unit bank as an institution having its ownership and origin in the local community and deriving its business chiefly from the communities industrial and commercial activities and from the farming population within its vicinity or trade area. Its activities are usually fully integrated with local economic and social organization. The bank hold-

ing company device threatens to destroy this democratic grass roots institution."

* * *

"While our banking structure has evolved down through the years to meet changing economic requirements, this country has held steadfast to the doctrine that competition should prevail in the banking industry. Our national banking policy has aimed at protecting and fostering the growth of independent unit banks."

* * *

"Your committee believes it obvious that the declared will of Congress in favor of independent competitive banking is being thwarted by indirect branch banking, through the mechanism of the holding company." House Report No. 609, 84th Congress, 1st Session, May 20, 1955, House Miscellaneous Reports, Vol. III.

With these purposes in mind, it would have indeed been strange if Congress had sought to regulate this form of banking monopoly and undesirable concentration of economic power at the national level while simultaneously depriving the states of their police power to deal with the same economic maladies at the local level. As already noted, Congress had previously adopted state law as the measuring rod under Section 36(c) of the National Bank Act for the establishment of branches by national banks. *Commercial State Bank* v. *Gidney*, 174 F.Supp. 770, 774 (D.C. 1959), affirmed 278 F.2d 871 (1960). It would therefore be most peculiar if Congress, by reason of the Federal Bank Holding Company Act, had deprived the states of their right to deal with "uncontrolled branch banking" through the "holding company device".

Congress, of course, did no such thing. When the bill was taken up by the Senate in 1956, Senator

Robertson, Chairman of the Senate Banking and Currency Committee, made it perfectly clear that the states were to retain their complete control over bank holding companies and their bank subsidiaries, *national and state*, within their respective jurisdictions. Senator Robertson, referring to an earlier statement by Senator Maybank, stated:

> "Now, to me, states rights means the right of a state to choose its own course of action on a matter within its own jurisdiction and not have the Federal Government make up its mind for it. This is the positive approach. A state should have the right to permit or prohibit branch banking, and at the same time, it should have the right to permit or prohibit the operation of bank holding companies within its borders. Any Federal legislation which forces a state to change its policies with respect to either branch banking or holding companies would be an unwarranted interference with states rights. . . .
>
> "Therefore, each state, may, within the limits of its proper jurisdictional authority, enact legislation to regulate bank holding companies. . . ." Congressional Record, 84th Congress, 2nd Session, Page 6752

The Senate Report in support of the Federal Bank Holding Company Act specifically authorized the states to be "more severe" and "more restrictive" than the Federal Act was on bank holding companies and their subsidiaries within the states borders. At Page 2493 of the United States Code and Congressional News, 1956, the Senate Committee Report states:

> "In any event, another provision of this bill expressly reserves to the states a right to be more restrictive regarding the formation of or operation of bank holding companies within their re-

spective borders than the Federal authorities can be or are under this bill. Under such a grant of authority, each state, within the limits of its proper jurisdictional authority may be more severe on bank holding companies as a class than (1) this bill empowers the Federal authorities to be, or (2) such federal authorities actually are in their administration of this bill. In the opinion of the Committee, this provision adequately safeguards states rights as to bank holding companies."

At first, the Senate Committee declined to give to the states "automatic jurisdiction" over out of state bank holding companies desiring to acquire banks within the limits of a state. However, again Congress, as a result of an amendment offered by Senator Douglas of Illinois, chose to adopt the law of the state as the measuring stick to determine whether an out of state bank holding company could acquire banks within the limits of the state in question. The Douglas amendment now appears as 12 U.S.C. 1842(d):

"Notwithstanding any other provision of this section, no application shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the state in which such bank holding company maintains its principal office and place of business or in which it conducts its principal operation unless the acquisition of such shares or assets of a state bank by an out of state bank holding company is specifically authorized by the statute laws of the state in which such bank is located, by language to that effect, and not merely by implication." (See also: Congressional Record, 84th Congress, 2nd Session, Page 6857)

Senator Douglas explained the meaning of his amendment at Page 6858 of the Congressional Record as follows:

> "I may say that what our amendment aims to do is to carry over into the field of holding companies the same provisions which already apply for branch banking under the McFadden Act-namely our amendment will permit out of state holding companies to acquire banks in other states only to the degree that state laws expressly permit them; and that is the provision of the McFadden Act."

Thus, in the final analysis, the Federal Bank Holding Company Act contains two separate provisions, both expressly reserving to the states complete control over all bank holding company operations and expansions:

1. 12 U.S.C. 1842(d), which reserves to the states the absolute right to exclude all out of state bank holding companies, and to prevent them from opening banks, *national or state,* within the state's borders; and

2. 12 U.S.C. 1846, which reserves to the states the right to regulate, and if required, to exclude in-state bank holding companies, or to prevent them from opening banks, *national or state*, within the states borders.

It would be an anomalous situation if states were to have the absolute right to exclude out of state bank holding companies and to prevent them from opening banks, without, at the same time, having the power, as now exercised by Louisiana, to prevent bank holding companies within the state's own boundary from opening "in-state banks", whether state or national. By virtue of 12 U.S.C. 1842(d), Congress has taken

from the Comptroller of the Currency the authority to license a national bank within a state which is owned by an "out of state" bank holding company unless the statute laws of the state in which such bank is to be located specifically authorize the acquisition by the "out of state" bank holding company. Congress has likewise removed from the discretion of the Comptroller, by virtue of 12 U.S.C. 1846, the right to license the operation of a subsidiary of a Louisiana bank holding company where the operation of such would be unlawful and prohibited by Louisiana Act 275 of 1962. *Commercial State Bank* v. *Gidney*, 174 F.Supp. 770, 778, affirmed 278 F.2d 871 (D.C. 1960); *Camden Trust Company* v. *Gidney*, 301 F.2d 521 (D.C. 1962), cert. denied, 369 U.S. 886; *Wayne Oakland Bank* v. *Gidney*, 252 F.2d 537 (6th Cir. 1958), cert. denied, 358 U.S. 830.

In effect, Act 275 prohibits evasive or "indirect" branching and Section 36(c) of the National Bank Act prohibits "direct" branching, except in accordance with state law. It is therefore submitted that Act 275 is not only consistent with and permissible under the Federal Bank Holding Company Act, but clearly supplements and strengthens the purpose and intent of the National Bank Act.

In view of the aforementioned congressional history underlying the Federal Bank Holding Company Act, the explicit language of 12 U.S.C. 1846, and the specific holdings in the *Bracburn* case, supra, and *Opinion of the Justices*, supra, it is submitted that the District Court was eminently correct in holding that Act 275 of 1962 is constitutional; that said Act is directly applicable to Whitney-Jefferson, a wholly owned subsidiary of a Louisiana incorporated bank holding com-

pany; and that the Comptroller of the Currency has no discretion to issue a certificate to said Bank which would authorize an operation prohibited by law.

Petitioners seek to avoid the decisive effect of *Bracburn* and *Opinion of the Justices* by contending that Section 3(5) of Louisiana Act 275 is *sui generis*, and without precedent. Petitioners point to the fact that the statutes approved by the Illinois and New Hampshire courts only prohibited future acquisitions of bank stock by new or existing bank holding companies, whereas Section 3(5) of the Louisiana Act attempts to prohibit an already chartered and existing national bank from doing business. By analogy, petitioner Whitney erroneously states that "it is no different from the state statute purporting to require the closing of an operating national bank because of a new state legislative determination disapproving of the ownership of its stock, for example, on the ground that more than a certain percentage is owned by a religious or a labor organization." (Whitney Brief, p. 49, 50). However, the analogy is fallacious and the distinction which petitioner attempts to make is without legal significance. Respondent will concede that there is no other State Bank Holding Company Act which has the exact language contained in Section 3(5) of the Louisiana Act. However, this does not change the constitutional issues involved. If Congress has reserved to the states the right to prohibit and restrict the expansion of bank holding companies and, if necessary, to be more severe or restrictive than federal authorities, there is no difference between provisions which seek to restrict bank holding companies by (1) prohibiting the acquisition of stock in a national bank, or (2) by prohibiting a subsidiary of a

bank holding company, not already open for business, from opening for business.

Additionally, petitioners lose sight of the fact that Whitney-Jefferson is the subsidiary of a Louisiana incorporated bank holding company, which subsidiary had not yet opened or engaged in business as a national bank. Petitioners apparently hold the mistaken view that Whitney-Jefferson enjoyed some special status by reason of the fact that it was already organized, even though without a certificate of authority to commence banking business. Respondent submits that Whitney-Jefferson, although organized on paper, had not yet functioned as a national bank and that without a certificate of authority, it was, in actuality, not a national bank lawfully authorized to do business. Section 3(5) is therefore not, as contended by petitioners, an attempt to regulate an operating national bank, but rather a prohibition against the opening of a wholly owned subsidiary of a Louisiana bank holding company, which subsidiary had never engaged in banking business or been licensed as a national bank.

Petitioners further contend that Act 275 is discriminatory. Louisiana has always possessed under the United States Constitution a paramount police power to enact emergency legislation, if necessary, to protect and preserve the vital interest of the community. *Stone* v. *Mississippi*, 101 U.S. 814; *Douglas* v. *Kentucky*, 168 U.S. 488; *Home Building and Loan Association* v. *Blaisdell*, 290 U.S. 398; *Veix* v. *Sixth Ward Building and Loan Association*, 310 U.S. 32; *East New York Savings Bank* v. *Hahn*, 326 U.S. 230. Louisiana Act 275 was designated "emergency" legislation and sought as its objective to prohibit the formation of new bank holding companies and the acquisition of

additional banking institutions by existing bank holding companies and their subsidiaries. It would be a strange result indeed if the Constitution, as contended by petitioners, somehow prevented Louisiana from exercising its police power to safeguard the interest of its banking industry in the face of a combined attempt by the Comptroller of the Currency and the largest bank in the state to circumvent and evade existing banking laws; especially after Congress specifically reserved to Louisiana full jurisdiction over banks, bank holding companies and subsidiaries in 12 U.S.C. 1846. If this were true the reservation contained in 12 U.S.C. 1846 would be meaningless.

With regard to Louisiana power in such cases to select the means necessary to protect the vital interest of its economy, the Supreme Court ruled in *East New York Savings Bank* v. *Hahn*, supra, at pages 233-235:

> "Once we are in this domain of the reserved power of a state we must respect the wide discretion on the part of the legislature in determining what is and what is not necessary . . .
>
> "It would indeed be strange if there were anything in the Constitution of the United States which denied the state the power to safeguard its people against such dangers."

The fallaciousness of petitioners argument that the act is discriminatory is further demonstrated by the recent decision of the Supreme Court in *Ferguson, Attorney General of Kansas* v. *Skrupa, d b a Credit Advisers*, 372 U.S. 726. In that case, Kansas like Louisiana in the case at bar made it unlawful for any person to engage in a particular business (the prohibited operation was "debt adjusting."). The Supreme Court upheld the constitutionality of the statute, even as it applied to firms engaged in the prohibited business for a

long period prior to the enactment of the state statute. The Supreme Court ruled:

> "We conclude that the Kansas Legislature was free to decide for itself that legislation was needed to deal with the business of debt adjusting. . . . We refuse to sit as a 'super-legislature to weigh the wisdom of the legislation' . . . nor are we able or willing to draw lines by calling a law 'prohibitory' or 'regulatory'. . . . The Kansas statute may be wise or unwise but relief, if any be needed, lies not with us but with the body constituted to pass laws for the State of Kansas."

For the foregoing reasons respondent, The State Bank Commissioner of Louisiana, respectfully submits that the District Court was correct in upholding the constitutionality of Louisiana Act 275 of 1962 and in ruling that the Comptroller has no discretion to issue a certificate to a subsidiary of a Louisiana incorporated holding company which would authorize a banking operation specifically prohibited by state law.

III.

The State Bank Commissioner of Louisiana Has Standing to Challenge the Unlawful Action of the Comptroller of the Currency in the Case at Bar.

Respondents, Bank of New Orleans and Trust Company, and Bank of Louisiana in New Orleans, are State chartered banks having their principal offices in Orleans Parish. The other respondent, Guaranty Bank and Trust Company, is a State chartered bank located in Lafayette Parish. Each respondent bank derives a substantial volume of business from the East Bank of Jefferson Parish (J.A. 292, 303, 305) but, each is prohibited by Louisiana law from establishing branches in Jefferson Parish or in any other parish other than its home parish. Respondent State banks correctly

state that they have a right under a combination of federal and state statutes to be free of unlawful competition in East Jefferson Parish which would result if Whitley-New Orleans is allowed to establish branches in Jefferson Parish.

The Court of Appeals for the District of Columbia Circuit correctly concluded in the instant case that respondent State banks have standing to bring this action against the Comptroller. The Court stated:

> "Clearly, then, under the allegations of their complaint the three state banks have standing. It is not enough to say contra that the Whitney-Jefferson bank will not be a branch of Whitney-New Orleans and that, therefore, the State banks have no legal right to protection against its establishment and consequently no standing to sue. For, whether or not Whitney-Jefferson will in legal effect be a branch of Whitney-New Orleans is the question tendered for adjudication, upon which under the circumstances the question of standing in part depends. If it is determined that Whitney-Jefferson is not a branch, it might or might not follow that the State banks have no standing—a matter on which we need not pass; but if it is held to be tantamount to a branch purporting to have been federally authorized, their standing would be indubitable." (J.A. 467)

The Court went on to say at J.A. 468:

> "The charters of the appellee banks, granted by the State of Louisiana, are guarded by a combination of specifically applicable federal and state statutes. The appellee banks cannot complain of lawful competition from other lawfully chartered state or national banks because their own charters are not exclusive licenses. But, where, as here, the threatened competition arises from an allegedly illegal facility, the appellee banks have standing

> to invoke the jurisdiction of a federal court to challenge the alleged unlawful federal administrative action which admittedly would result in irreparable injury to their property rights in their charters."

Clearly under the circumstances of the instant case and the prevailing law respondent state banks have standing to challenge the unlawful action of the Comptroller of the Currency. See: *Commercial State Bank of Roseville* v. *Gidney*, 174 F.Supp. 770, affirmed 278 F.2d 871 (1960); *Wayne Oakland Bank* v. *Gidney*, 252 F.2d 537, cert. denied 358 U.S. 838; *Wisconsin Bankers Association* v. *Robertson*, 190 F.Supp. 90, affirmed 294 F.2d 714, cert. denied 268 U.S. 938.

Since the lower court had no difficulty in holding that the state banks have standing to sue in this action, the Court found it unnecessary to decide whether the Louisiana State Bank Commissioner has standing. Respondent submits that it is equally clear that the State of Louisiana through its Bank Commissioner has the right to contest any action of the Comptroller of the Currency which is unlawful under the laws of the State of Louisiana and which would adversely affect state banks under the supervision of the State Banking Department.

After Louisiana adopted Act 275 of 1962, and after the constitutionality of that statute was attacked by petitioners, the State Bank Commissioner of Louisiana moved to intervene as a party plaintiff pursuant to Rule 24 of the Federal Rules of Civil Procedure (J.A. 346). Rule 24 provides in part:

> "*Intervention*
>
> "(a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in

> an action . . . (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action . . . .
>
> "(b) *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action . . . (2) when an applicant's claim or defense have a question of law or fact in common. *When a party to an action relies for ground of claim or defense upon any statute . . . administered by a federal or state governmental officer . . . the officer . . . upon timely application may be permitted to intervene in the action.*" (Emphasis supplied)

All parties consented to the intervention (J.A. 385), and the Court thereupon entered an order granting respondent's motion to intervene.

Considering the fact that petitioners have already consented to the filing of a complaint by the State Bank Commissioner, it is respectfully submitted that petitioners cannot now deny respondent's standing. However, petitioners consent notwithstanding, the Commissioner clearly has standing to bring this action under the circumstances of the case at bar.

The State Bank Commissioner is charged with the administration and enforcement of Louisiana Act 275 of 1962. Section 5 of the Act provides:

> "The State Bank Commissioner shall administer and carry out the provisions of this Chapter and may issue such regulations and orders as may be necessary to discharge this duty and to prevent evasions of the Chapter."

In addition to the foregoing statutory duty imposed upon the State Bank Commissioner, respondent is also

charged with the responsibility of enforcing other banking laws of Louisiana, including Louisiana Revised Statutes 6:54 which must be read in conjunction with Section 36(c) of the National Bank Act. In view of the fact that the Attorney General of Louisiana has rendered an opinion declaring that the proposed Whitney operation in Jefferson Parish violates Section 36(c) and LSA-RS6:5 respondent has not only a right, but a duty to challenge the unlawful action of the Comptroller. (J.A. 161-164)[2]

The following language from the Court of Appeals for the Ninth Circuit in *People of the State of California* v. *United States*, 180 F.2d 596, 600, 601, is cogent:

> "To deny the State the right to intervene in this case would be to deny the State the right to defend those provisions of its Constitution and laws . . .
>
> "If a state may enact a statute, such as California has, it may appear in Court and defend that statute. California has an undoubted right to intervene to protect and assert the validity of its enactment on that subject."

Considering the fact that the banking laws of Louisiana, including Act 275 of 1962, are administered by the State Bank Commissioner, and that a Louisiana Statute is under constitutional attack, petitioners contention that this respondent has no standing to bring this action is without merit. Rule 24 of the Federal Rules of Civil Procedure; *Guaranty Trust Company* v. *West Virginia Turnpike Commission*, 109 F.Supp.

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[2] The opinion of the Attorney General of the State of Louisiana is entitled to great weight and should have been considered by the Comptroller. *Michigan National Bank* v. *Gidney*, 237 F. 2d 762, cert. denied, 352 U.S. 847.

286, 294; *All America Airways, Inc.* v. *Cedarhurst*, 201 F.2d 273, 274; *Securities and Exchange Commission* v. *United States Realty and Improvement Company*, 310 U.S. 434, 458, 459, 460.

CONCLUSION

The preservation of the competitive system in this Country, particularly in the field of banking, must be maintained if this Country is to retain its vitality. The Whitney plan represents a deliberate attempt by a national bank to circumvent federal and state laws restricting branch banking and to undermine the competitive equality heretofore existing between states and national banks. If this scheme is allowed to materialize the protection historically afforded to state banks by Section 36(c) of the National Bank Act will be destroyed and Congressional intent will be frustrated.

For the foregoing reasons respondent prays that the decision of the Court of Appeals be affirmed and that the Comptroller of the Currency remain permanently enjoined from issuing a certificate of authority which would license a banking operation prohibited by law.

Respectfully submitted,

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Nos. 26 and 30

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 26

WHITNEY NATIONAL BANK IN JEFFERSON PARISH,
Petitioner,

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL.
Respondents.

No. 30

JAMES J. SAXON, Comptroller of the Currency,
Petitioner,

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL.
Respondents.

BRIEF FOR AMICUS CURIAE INDEPENDENT BANKERS ASSOCIATION

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INDEX

	Page
Interest of Amicus Curiae	1
Statement of the Case and Statutes	3
Summary of Argument	3
Argument	
I. The establishment of a holding company system by the use of the capital funds of a national bank, for the express purpose of evading state branch banking laws, violates sec. 36(c) of the National Bank Act	6
II. The Louisiana statute is valid and controls operation of bank holding companies within the state	9
A. Section 1003(5) does not violate the supremacy clause of the Federal Constitution	10
B. Section 1003 (5) does not violate the Fourteenth Amendment	22
III. Approval of the Whitney scheme will disrupt federal banking policies	28
A. Federal policy of accommodation to state banking regulation will be frustrated if the Whitney scheme is approved	29
B. Federal policy of preventing concentration of banking will be undermined by approval of the Whitney scheme	34
IV. Conclusion	40
Appendix A	1a
Appendix B	6a

TABLE OF CITATIONS

Cases:	Page
Braeburn Securities Corp. v. *Smith*, 15 Ill. 2d 55, 153 N.E. 2d 806 (1958)	20
Commercial State Bank of Roseville v. *Gidney*, 175 F. Supp. 770 (D.D.C. 1959), *aff'd* 278 F. 2d 871 (D.C. Cir. 1960)	9, 28
Cotting v. *Kansas City Stockyards Co.*, 183 U.S. 79	23
Ferguson v. *Skrupa*, 372 U.S. 726	25-27
First National Bank of California, 262 U.S. 366	22
Lindsey v. *Natural Carbonic Gas Co.*, 220 U.S. 61	24
Munn v. *Illinois*, 94 U.S. 113	5, 24
Opinion of the Justices of New Hampshire, 151 A. 2d 236 (1959)	20
United States v. *First Nat'l Bank & Trust Co. of Lexington*, 376 U.S. 665	35
United States v. *Philadelphia National Bank*, 374 U.S. 321	35
Wayne Oakland Bank v. *Gidney*, 252 F. 2d 537, (6th Cir. 1958) *cert. denied*, 358 U.S. 830	9
Williamson v. *Lee Optical Co.*, 348 U.S. 483, 489	22

Constitution and Statutes:	
Constitution of the United States:	
Article VI, Clause 2	9
Amendment XIV, Section 1	9
Bank Holding Company Act of 1956 (Pub. L. 511, 84th Cong., 2d Sess., Act of May 9, 1956, c. 240, 70 Stat. 133)	2, 32, 34
Sec. 3(b), 12 U.S.C. § 1842(b)	13
Sec. 3(c), 12 U.S.C. §1842(c)	34
Sec. 3(d), 12 U.S.C. § 1842(d)	13, 34
Sec. 7, 12 U.S.C. § 1846	4, 11, 13
Sec. 11, 12 U.S.C. note to § 1841	11, 12, 34
Labor Management Relations Act (Taft-Hartley Act) § 8(a)(3), 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(3) (1958)	10
§ 14(b), 61 Stat. 151 (1947), 29 U.S.C. § 164(b) (1948)	10

Page

National Bank Act (Act of June 3, 1964), c. 106, 13 Stat. 99 as amended:
12 U.S.C. § 24 7
12 U.S.C. § 27 8
12 U.S.C. § 36(c) 4, 6, 9, 31
12 U.S.C. § 51 31
12 U.S.C. § 85 31
12 U.S.C. § 90 31
12 U.S.C. § 92a(a) 31
12 U.S.C. § 214 to 214c 31
12 U.S.C. § 317a 31
12 U.S.C. § 548 31
12 U.S.C. § 1828(c); Bank Merger Act of 1960. 31, 34

Georgia Code Annotated, § 13-201.1(e), 13-207 (Supp. 1960) 15, 20

Illinois Statutes Annotated, ch. 16½, § 71-76 (Supp. 1960) 15

Kentucky Revised Statutes Annotated, § 287.030(2), (3) (1955) 15

Louisiana Revised Statutes, Title 6:
La. R.S. §§ 1001-1006 (Louisiana Act No. 275 of 1962) 9
La. R.S. § 6.1003(5) 4, 5, 10, 20

Michigan Statutes Annotated, § 21.10(i) (1935) 16

Mississippi Code Annotated, §§ 5196, 5197, 5235 (1956) 16

Nebraska Revised Statutes, §§ 8-901 to 904 (1963 Cumm. Supp.) 12

New Hampshire; Laws of New Hampshire, ch. 188 (Jan. Sess. 1963) 16

Oklahoma Constitution, Art. 9, § 41 16

Oklahoma Statutes, Tit. 79, § 31 (1951) 16

South Carolina Code, §§ 12-77 (1952, since repealed) .. 16

Vermont Statutes Annotated, Tit. 11, § 131 (1958), Tit. 8, § 769 (1961) 16

Washington Revised Code, Tit. 30, § 30.04.230, as amended in 1961 (1961) 16

West Virginia Code Annotated, ch. 31, § 3220 (1955) .. 16

Page

MISCELLANEOUS:

102 Cong. Rec. 6752 (1956) 19

Hearings Before the House Committee on Banking & Currency, 88th Cong., 1st Sess. (April 30, May 1, 2, 3, and 6, 1963) 16, 17

Hearings Before a Subcommittee of the Senate Committee on Banking & Currency, 84th Cong., 1st Sess. (July 5 to 12, and 14, 1955) 16, 17

Hearings Before the House Committee on Banking & Currency, on Control and Regulation of Bank Holding Companies, 84th Cong., 1st Sess. (Feb. 28 to March 9, 1955) 14

H. R. Rep. No. 609, 84th Cong., 1st Sess., p. 22 (May 20, 1955); H. Misc. Rep., Vol. 3 .....18, 36

S. Rep. No. 1095, 84th Cong., 2d Sess., found in Vol. 2, 1956 U.S. Code Cong. & Admin. News 4, 19, 36

Special Staff Report of the Board of Governors of the Federal Reserve System Submitted to the Senate Select Committee on Small Business, 87th Cong., 2d Sess. (Comm. Print, Jan. 5, 1962) 38

Staff Report to the House Select Committee on Small Business, on Banking Concentration and Small Business, 86th Cong., 2d Sess. (Comm. Print, 1960) 38

Statement of Rep. Wright Patman, Chrm., House Comm. on Banking & Currency, August 27, 1963 (contained as Appendix B, herein) 39

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 26

WHITNEY NATIONAL BANK IN JEFFERSON PARISH,
Petitioner,

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL.
Respondents.

No. 30

JAMES J. SAXON, Comptroller of the Currency,
Petitioner,

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL.
Respondents.

BRIEF FOR AMICUS CURIAE INDEPENDENT BANKERS ASSOCIATION

INTEREST OF AMICUS CURIAE

This brief of *Amicus Curiae* is filed pursuant to Rule 42 of this Court with the consent of all parties herein. (See Appendix A.)

The Independent Bankers Association was formed 34 years ago and its membership now consists of about

6,300 national and state banks in 40 states, 91 members being in Louisiana.

One of the prime purposes of the Association, and the reason for which it was organized, is to promote and preserve competition in the field of banking and to oppose efforts at concentration of banking power which threaten to lessen or destroy competition.

Amicus is necessarily interested in the issues involved in this case because its member banks will be adversely affected if the Whitney plan to evade Section 36c of the National Bank Act is allowed to succeed. *Amicus* submits that the Whitney plan and the proposed act of the Comptroller of the Currency are clearly violative of the National Bank Act. *Amicus* is particularly concerned because of Whitney's and the Comptroller's attempt to justify this evasion of federal law on the grounds that such evasion is not only permitted but specifically contemplated under the Bank Holding Company Act of 1956.

The Independent Bankers Association sponsored the Bank Holding Company Act of 1956 (70 Stat. 133-138, 12 U.S.C. §§ 1841-1847) and for 14 years urged its adoption by Congress. It has observed and participated in the application of this Act in many situations since it became effective, and is familiar with its practical operation. It views the Act as part of the body of antitrust law because it was designed to place restraints upon the use of the bank holding company device as a means of rapid concentration of control of sources of commercial credit. The Act was not intended to grant new powers to banks, as petitioners seem to infer, but to control a device increasingly used to circumvent states' restrictions upon

branch banking. It was meant to control artificial growth of banking power through acquisitions of banks into a single control, thus reducing the number of alternate sources of credit available to borrowers.

Amicus will demonstrate to the Court that the scheme used in the instant case is a patently perverse use by the Comptroller of the authority and discretion vested in him by the National Bank Act. It was conceived by unlawful means, was designed to circumvent federal and state branch banking laws, and in operation would violate a state prohibitory statute. Judicial approval of the Whitney scheme will be tantamount to an open-door policy to large metropolitan banks to create holding companies by use of their own funds in "bootstrap" arrangements designed to nullify the effect of state banking laws.

STATEMENT OF THE CASE AND STATUTES INVOLVED

For the purpose of this brief, *Amicus Curiae* adopts the statement of facts contained in the opinions of the courts below (R. 444-448 and 455-465, 470-476), and in the brief of respondent banks herein. The principal statutes involved are set forth verbatim in Appendix A to the briefs filed in this court by Petitioner Saxon and Petitioner Whitney-Jefferson.

SUMMARY OF ARGUMENT

I

Amicus fully adopts the arguments of the respondents that the establishment of a holding company system by Whitney National Bank of New Orleans (hereafter Whitney-New Orleans) by the use of its own capital funds—for the express purpose of evading

Louisiana's branch banking laws—violates Section 36 (c) of the National Bank Act. (12 U.S.C. § 36(c)).

II

1. Realizing that Section 1003 (5) of the Louisiana statute (L.R.S. § 6: 1003 (5)) operates as an absolute bar to the Whitney holding company scheme, the petitioners assert that this section offends the Supremacy Clause of the Constitution of the United States. They contend that federal banking legislation has preempted the field of the chartering and organization of national banks. However, Section 7 of the Bank Holding Company Act of 1956, 12 U.S.C. § 1846, specifically reserves to each state the "powers and jurisdiction which it now has." Several states had statutes *prohibiting* bank holding companies at the time the Bank Holding Company Act was passed. Senator Robertson, the Chairman of the Senate Banking and Currency Committee and sponsor of the Act, in explaining the provisions of the Act on the Senate floor, read into the Congressional Record a Georgia statute as an example of the jurisdiction a state "now has." This Georgia statute forbade any expansion of a bank holding company system beyond two banks; thus it directly affected the organization and chartering of national banks. The legislative history of Section 7 leaves no doubt as to its scope; a state was to have the right to be "more restrictive" and "more severe" on bank holding companies as a class than could the federal authorities under the Act. *S. Rep.* No., 1095, 84th Cong. 2d Sess., Vol. 2, 1956 *Code Cong. & Admin. News*, 2492. This interpretation of Section 7 is reinforced when Section 11 of the same act is read with it; Section 11 states that nothing in the Act is to be con-

strued as approval for conduct "in violation of existing law." The Louisiana statute does not frustrate federal law; it comports with the overriding policy of federal banking legislation which is accommodation to state regulation in the same field.

2. Likewise Section 1003 (5) does not violate the Fourteenth Amendment. The statute does not constitute special legislation; it extends to the whole class of bank holding companies and applies equally to any holding company that may be established in the state. It has been clear since *Munn* v. *Illinois*, 94 U.S. 113, 132, that states have the power to legislate against commercial abuses they believe to be injurious to their internal business affairs. It is not unreasonable for Louisiana to determine that the bank holding system threatens competition in banking and thus is against the public interest of that state. Having made its policy determination against holding companies, Louisiana had the right to put its decision into effect immediately. Any injury to Whitney-Jefferson is only an incidental effect of the policy determination Louisiana made against all bank holding companies.

III

Amicus fears that approval of the instant scheme will violate two long standing federal banking policies: (a) to maintain competitive equality between national and state banks, and (b) to preserve competition and restrain concentration in the field of banking. The central issue here is whether a holding company system is to be born contrary to the wishes of the people of Louisiana and contrary to a federal and state statutory program which has for decades recognized that the people in each state are best able to

judge the type of banking structure suitable to their economic needs. There is presently a delicately balanced accommodation of federal and state banking laws which permits national and state banks to operate side by side and to compete on an equal plane. It has been consistent federal policy that the two *systems* should not be brought to the point of vying with each other for supremacy and that the "dual-banking" system should be preserved. Approval of the Whitney scheme would be a blow to this policy of accommodation between federal and state banking regulation.

ARGUMENT

I. THE ESTABLISHMENT OF A HOLDING COMPANY SYSTEM BY THE USE OF THE CAPITAL FUNDS OF A NATIONAL BANK, FOR THE EXPRESS PURPOSE OF EVADING STATE BRANCH BANKING LAWS, VIOLATES SEC. 36(c) OF THE NATIONAL BANK ACT.

In the words of the Court of Appeals below:

> There was actually no pretense about the matter: Whitney of New Orleans frankly proposed to evade the statutes by establishing through the holding company arrangement an office in east Jefferson Parish which it would manage and control. (R. 470)

The essential and undisputed facts surrounding the entire Whitney plan have been clearly set forth by the Court of Appeals in the instant case and by respondent banks in their brief. *Amicus* wholly adopts the arguments of respondents and the conclusions of the Court of Appeals that the Whitney scheme is violative of Section 36(c) of the National Bank Act.

Petitioners throughout the course of this litigation have attempted to convey the impression that the role played by the Comptroller in the Whitney "plan of

reorganization" was routine and consistent with the normal procedures incident to the formation and chartering of a new national bank. Without unnecessary repetition of the arguments already made by respondents, *Amicus* would like to demonstrate to the Court the unusual and unique character of the Comptroller's involvement in the Whitney scheme, which involvement is by no means normal or routine. The Petitioners concede that the approval of two federal agencies was necessary before the Whitney program could be put in effect, i.e., the Office of the Comptroller of the Currency and the Federal Reserve Board. (Whitney-Jefferson brief, p. 7; Saxon brief, p. 20). It is the actions taken by the Comptroller which are at issue in the instant case and about which *Amicus* is concerned. These actions, by his own affidavits (R. 41-48, 310), consisted of the following:

A.) He advised a national bank how by the use of its own funds it might evade the branch banking regulations he was charged by law with enforcing. (R. 41-48).

B.) He approved the investment by Whitney-New Orleans of its funds in the stock of a Louisiana bank holding corporation for its own account. *Amicus* submits there is no authority of any kind which would justify such an investment by a national bank of its funds. (12 U.S.C. § 24).

C.) The Comptroller approved the organization and chartering of a new national bank, Crescent City National Bank, which was characterized by Governor Robertson of the Federal Reserve Board as a "phantom" bank. The Comptroller knew that Crescent City would never accept the funds of depositors, would never make any loans, would never handle any trust

accounts, and in fact would never open its doors to the public for banking business of any kind. The approval of Crescent City by the Comptroller was given with the knowledge that it was to be the predetermined means by which Whitney-New Orleans was to convert itself into a subsidiary of a bank holding company, which holding company it had spawned with its owns funds. Certainly this is not a "legitimate" object for which the Comptroller should charter a national bank. (12 U.S.C. § 27).

D.) He approved the consolidation or merger of Whitney-New Orleans into Crescent City (the phantom bank) with the bold assertion that the consolidation was "in the public interest" (R. 34). He knew full well that this was to be nothing more than a link in the illegal chain by which Whitney-New Orleans, the largest bank in the State of Louisiana, sought to establish additional banking facilities in Jefferson Parish.

E.) Finally, the Comptroller approved the organization of a proposed new national bank in Jefferson Parish, which entity constituted the ultimate step in the scheme to establish a Whitney banking office in Jefferson Parish. Before the Comptroller could add the last link to the illegal chain by issuing the required certificate of authority for Whitney-Jefferson to operate as a national bank, he was enjoined by the District Court in the instant case.[1]

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[1] It is interesting to note that the Comptroller at first voluntarily withheld the issuance of the Certificate for a short time after the commencement of this suit; however, he later advised respondents through counsel that he would no longer delay issuance of the Certificate. Whereupon, the District Court granted respondents request for a temporary restraining order. (R. 182, 191)

The foregoing dramatic series of events clearly indicates the Comptroller's deep involvement in the Whitney scheme to evade federal and state bank branching restrictions and illustrates the *ultra vires* nature of his action. The Comptroller has knowingly permitted the use of his office to foster and encourage a scheme admittedly designed to destroy the very law he is sworn to enforce. This is a flagrant abuse of the discretion vested in the office of the Comptroller of the Currency. *Amicus* respectfully submits that the law is clear that the Comptroller has no discretion to issue a certificate of authority that would authorize the unlawful operation of a bank. *Wayne Oakland Bank* v. *Gidney*, 252 F. 2d 537 (6th Cir. 1958) *cert. denied*, 358 U.S. 830; *Commercial State Bank of Roseville* v. *Gidney*, 175 F. Supp. 770 (D.D.C. 1959) *aff'd.* 278 F. 2d 871 (D. C. Cir. 1960).

II. THE LOUISIANA STATUTE IS VALID AND CONTROLS OPERATION OF BANK HOLDING COMPANIES WITHIN THE STATE.

The Court of Appeals for the District of Columbia Circuit sustained the injunction granted by the district court on the ground that it violated existing federal law (12 U.S.C. §36(c)). It was not necessary for it to consider the holding of the district court that the completion of the Whitney scheme also was prohibited by Louisiana Act 275 of 1962 (codified as LSA 6:1001, et seq.). However, recognizing that Act 275 is an additional bar to the completion of the Whitney scheme, petitioners have made a frontal assault on the statute by asserting that it violates both the Supremacy Clause [2] and the Fourteenth Amendment of the Con-

[2] Art. VI, ch. 2.

stitution of the United States. *Amicus* would like to discuss both of petitioners' charges in detail.

A. Section 1003 (5) Does Not Violate the Supremacy Clause of the Federal Constitution

Petitioners assert that L.S.A. R.S. 6:1003 (5) offends the Supremacy Clause because it is in conflict with federal banking legislation which preempts the field of the chartering and organization of national banks.

It is clear that Congress can pass a regulatory statute in an area of its competence without preempting the field and superseding all state law in the area. For example, in the labor field, Congress specifically authorized unions and management to enter into union shop contracts if they desire.[3] However, in so doing Congress specifically reserved to the states the right to pass "right to work" legislation if the state feels such legislation is desirable.[4] Therefore, the question in the instant case is simply whether Congress, by the passage of the Bank Holding Company Act of 1956, intended to exercise the full extent of its powers. *Amicus* contends that Congress specifically expressed its will that the states should not only be able to regulate bank holding companies and their subsidiaries,

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[3] Labor Management Relations Act (Taft Hartley Act) § 8(a)(3), 61 Stat. 140 (1947), 29 U.S.C. § 158 (a)(3) (1958).

[4] Labor Management Relations Act (Taft Hartley Act) § 14(b), 61 Stat. 151 (1947), 29 U.S.C. § 164(b) (1958).

but that if a state so desired it could lawfully prohibit such companies.

The District Court in the instant case held that Section 7 of the Bank Holding Company Act of 1956 reserved to the states the power to prohibit or restrict bank holding companies within their borders. The pertinent part of Section 7 reads:

> Sec. 7. The . . . Act . . . shall not be construed as preventing any state from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies and subsidiaries thereof.[5]

The holding of the District Court is all the more persuasive when Section 7, set out above, is read in conjunction with Section 11 of the same Bank Holding Company Act of 1956. The pertinent part of Section 11 reads:

> Sec. 11. Nothing herein contained shall be interpreted or construed as approving any act, action, or conduct which is or has been or may be in violation of *existing law*. . . . (emphasis added)[6]

The unambiguous language of these two sections leaves no doubt as to the intent of Congress.

Section 7 defers to the sovereign power of a state to control bank holding companies under "powers and jurisdiction *which it now has*", recognizing that ten states, at the time the Bank Holding Company Act was passed, had existing legislation regulating, restricting and even *prohibiting* bank holding companies.

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[5] 70 Stat. 138, 12 U.S.C. § 1846.

[6] 70 Stat. 146, 12 U.S.C. note to § 1841.

Some of these state statutes go back to 1915 and will be described shortly (R. 408). Section 11 flatly states that nothing in the Act is to be construed as giving approval for any act, action, or conduct "which is or has been or may be in violation of *existing* law." Because Congress did *not* restrict the clause to existing *federal* law, and because Congress was aware that some states prohibited bank holding companies altogether, it is evident that Congress intended nothing in the Act to legalize bank holding company operations in states that prohibited them. Section 7 also reserves to any state "powers and jurisdiction which it . . . *may hereafter have* with respect to . . . bank holding companies . . .", indicating that Congress expected that states in the future would enact laws regulating bank holding companies. In fact, 10 states enacted restrictive or prohibitory legislation *after* the Act was adopted in 1956.[7]

It is apparent at once that if this Court should hold the Louisiana statute invalid or inapplicable in the instant case, 19 state laws currently restricting or prohibiting holding companies, 10 enacted before the Act was passed[8] and 10 afterwards, would have doubt cast upon their validity. The resulting confusion would be extremely disruptive of existing accommodation between federal and state banking regulation.

Continuing with a review of the Act itself, we find that for Congress to defer to the states in the field of

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[7] R. 406-407 shows 8 States—Fla., Ind., Kan., La., Mass., N.J., N.Y., Pa.; in addition in 1963 Neb. outlawed bank holding companies, NEB. REV. STAT. § 8-901 to 904 (1963 Cumm. Supp.) and N.H. severely restricted their operation. Laws of New Hamp., ch. 188 (Jan. Sess. 1963).

[8] S. Car. had an existing statute in 1956, later repealed.

bank holding company regulations is not unusual. In two other provisions Congress recognizes state authority. In Section 3(b)[9] when a state bank is sought to be acquired by a holding company, "the views and recommendations of the . . . State supervisory authority . . . may be submitted." If "the . . . State supervisory authority . . . disapproves the application in writing . . .", a hearing is *required* to be held. Such a hearing brings into operation the Administrative Procedure Act under which certain procedural rights are afforded to the parties. Further, Section 3(d)[10] provides that a bank holding company cannot expand across state lines into another state unless that other state "specifically authorized" by its statute holding company acquisition of a bank within its borders.

Section 7, on its face, especially when read in conjunction with the other sections discussed above, shows that Congress intended the states to have the right to be more restrictive in controlling bank holding companies or even to prohibit them altogether. However, assuming *arguendo* that some ambiguity exists in the language of Section 7, its legislative history makes the intent quite clear beyond cavil.

As stated earlier, *Amicus* had urged Congress to adopt legislation controlling holding companies for a period of 14 years before adoption of the Act of 1956. There had been many hearings in both the House and the Senate, culminating in final hearings on the eve of

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[9] 12 U.S.C. § 1842(b).

[10] 12 U.S.C. § 1842(d).

consideration of the bills in 1955.[11] When it became clear that the Congress, and the Federal Reserve Board on whom Congress depended for technical advice, did not favor a law prohibiting or freezing bank holding companies but rather one controlling them, *Amicus* urged that the states retain the right to restrict or prohibit bank holding companies in the manner they felt best suited their needs. Congress and the Board readily agreed with this position. Indeed, the history of bank legislation in Congress consistently has followed the policy that each state is best able to judge for itself the type of banking structure suited to its peculiar economy. And Congress in enacting federal bank legislation has always observed this concept. In fact, Congress was persuaded to observe states rights in this matter because 10 states already had restrictive or prohibitory legislation concerning bank holding companies on their books at the time Congress was considering the bills in 1955 and 1956. Congress also wished to be consistent in its longstanding policy of maintaining equality between national and state banks.

As an example of the concern Congress felt over how best to preserve the states' power to regulate holding companies within their borders, the Chairman of the Senate Banking and Currency Committe, Senator Robertson of Virginia, stated on the floor of the Senate during consideration of the bill in 1956:

> "It should be noted that another provision of the Senate bill expressly preserves to the States their

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[11] *Control and Regulation of Bank Holding Companies, Hearings Before the House Committee on Banking and Currency*, 84th Cong., 1st Sess. (Feb. 28 to March 9, 1955); *Control of Bank Holding Companies, Hearings Before a Subcommittee of the Senate Committee on Banking and Currency*; 84th Cong., 1st Sess. (July 5 to 12, and 14, 1955).

present authority over bank holding companies within their respective borders. Therefore, each state may, within the limits of its proper jurisdictional authority, enact legislation to regulate bank holding companies. Mr. President, *as an example of the type of legislation the States may enact,* I ask unanimous consent to have printed in the Record the text of a bill recently passed by the Georgia legislature." (Emphasis supplied)[12]

Senator Robertson was speaking of Section 8 of S. 880[13] which finally became Section 7 of the Act, set out above, without change except that the year 1955 stated in the bill became 1956.

Senator Robertson referred specifically to the existing Georgia statute as an example of the jurisdiction a state "now has", and, although the other 9 states having existing laws were not mentioned, it must be assumed that Congress had them in mind. A summary of all these existing state acts follows:

Georgia—(*Ga. Code Ann.* § 13-201.1(e), 13-207 enacted February 27, 1956 restricting existing bank holding companies and prohibiting new ones.)

Illinois—(*Ill. Stat. Ann.* ch. 16½, § 71-76, enacted 1955, providing that a company cannot acquire more than 15% of the stock of 2 or more banks. The 1960 amendment, ch. 32, § 157.5(g) now prohibits holding companies from organizing and severely restricts those existing.)

Kentucky—(*Ky. Rev. Stat. Ann.* § 297.030(2), (3) enacted 1955 restricting ownership of bank stock by holding company to 50%.)

[12] 102 Cong. Rec. 6752 (1956), see text of Georgia Act R. 409.

[13] Senate Hearings *supra,* n. 11, p. 4.

Michigan—(*Mich. Stat. Ann.* § 21.10(i) enacted 1935 prohibiting formation of bank holding company.)

Mississippi—(*Miss. Code Ann.* § 5196, 5197, 5235, enacted 1934 prohibiting formation of holding companies without consent of State Comptroller.)

Oklahoma—(*Okla. Const.*, art. 9, § 41; *Okla. Stat.* tit. 79, § 31 enacted 1951 prohibiting bank holding companies.)

South Carolina—(*S.C. Code* § 12-77 enacted 1940 restricting amount of bank stock which can be owned by a holding company. Since repealed.)

Vermont—(*Vt. Stat. Ann.*, tit. 11, § 131 enacted 1916 controlling bank holding companies.)

Washington—(*Wash. Rev. Code.* tit. 30, § 30.04 enacted 1933 restricting amount of bank stock a holding company can own.)

West Virginia—(*W. Va. Code Ann.* ch. 31, § 3220, enacted 1955 prohibiting bank holding companies.)

When the hearings before the Senate Committee were being conducted, Governor Robertson of the Federal Reserve Board whom Chairman Martin asked to testify,[14] replied to questions of Acting Chairman Frear as follows:

> *Senator Frear.* You feel holding company jurisdiction should be governed and *controlled by the State legislatures* rather than by any Federal agency, especially your Board?
>
> *Mr. Robertson.* No, I do not. I say that the States ought to have the right to treat them differently from the way the Federal Government

[14] Senate Hearings, *supra* n. 11, p. 48.

does; but the fact that there are no laws today in the States which are adequate to meet this sort of problem, necessitates Federal legislation. However, *the legislation should permit the States to have more severe restrictions, if they wish;* but if they wish they ought to speak specifically as to holding companies and not apply laws which they have enacted relating to a different type of situation.

Senator Frear. How do you and the members of your Board feel regarding the jurisdiction of the State legislatures in controlling or regulating bank holding companies? Do you prefer that it be done by the State legislatures only in the absence of statutes now existing? Is this your opinion? Would you recommend that the State legislatures, or would it be your opinion that the State legislatures should take some action along this line?

Mr. Robertson. In my opinion, *the States should be free to deal with it* and I would like to see them deal with it, but the fact that there is not any legislation makes it *essential that there be Federal legislation in the meantime.*

* * * * * * * * *

Senator Frear. You think that section is quite all right?

Mr. Robertson. Oh, I think *they should have the right to enact more severe legislation, or any kind of legislation that they desire.*[15] (Emphasis supplied)

In the House hearings on the same bill with exactly the same provision for reservation of rights to states, Chairman Martin stated:

"In the first place, there is nothing in present law which restricts the ability of a bank holding com-

[15] *Id.* at 48, 49.

> pany to add to the number of its controlled banks. Consequently, there can well be situations in which a large part of the commercial banking facilities in a large area of the country may be concentrated under the management and control of a single corporation." [16]

and that problem was not being

> "[M]et by present law and cannot effectively be dealt with by the States *alone*." [16] (Emphasis supplied.)

The sense of the hearings in the Senate, whose concept became the 1956 Act, was that while nationwide control was needed immediately, the states should be free to supplement and strengthen this control to the extent each saw fit. In fact, the Comptroller of the Currency himself approved this concept. In the hearings before the House in a section by section commentary on the bill in 1955 the Comptroller stated: "Section 8. Reservation of rights to States: Satisfactory." [17] Following the hearings, the respective committees reported on the provision for reservation of rights to States as follows.

The House Committee report reads:

> "RESERVATION OF RIGHTS TO STATES
>
> The bill, in a clear-cut statement, would preserve all the rights which States, now or hereafter, may have to regulate banks or bank holding companies." [18]

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[16] House Hearings, *supra* n. 11, p. 13-14.

[16] *Id.* at 13.

[17] *Id.* at 132.

[18] H.R. REP. No. 609, 84th Cong., 1st Sess., p. 22 (May 20, 1955); H. MISC. REP., Vol. 3.

The Senate report reads:

> "*Section 7.*—This section makes clear that there is reservation of rights of any State for exercise of such powers as it has or may hereafter have with respect to banks, bank holding companies, and the subsidiaries thereof in a manner *more restrictive* than the provisions of this bill." [19]

Louisiana was therefore within its clearly reserved rights in enacting Act 275 which explicitly prohibits the formation of any bank holding companies within its borders. The Legislature adopted this Act by an overwhelming vote of 80 to 16 in the House and 28 to 7 in the Senate (R. 415). The *Record* discloses that the bill was treated as emergency legislation, and, to insure that its state policy against bank holding companies would be carried out at once, the Legislature included in the Act Section .1003(5).

The petitioners seem to concede that Congress has not preempted the entire field of the regulation of bank holding companies; however, they still contend that Congress has preempted the field of the "chartering and organization of national banks." A short answer to this contention is that Congress recognized that a number of states had legislation which prohibited, restricted the expansion of, or regulated bank holding companies--some of these statutes having a direct effect on the "organization and chartering" of national banks. For example, the very Georgia statute which was read into the *Congressional Record* by Senator Robertson as an example of the type of legislation states could enact, directly affects the organiza-

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[19] S. Rep. No. 1095, 84th Cong., 2d Sess., found in Vol. 2, 1956 *U.S. Code Cong. to Admin. News*, 2504.

tion and chartering of national banks. This Georgia statute, which carried heavy penalties, forbade any expansion of a bank holding company system beyond two banks. Therefore, it is obvious that Congress knew that if a bank holding company attempted to acquire or organize a new *national* bank chartered in Georgia, which would be the third bank in the system, it would violate Georgia state law. It is clear Senator Robertson intended the Georgia statute to be enforceable; it is also clear it directly affects the "chartering and organization" of national banks. In fact it defines the term "bank" to include "any national or state bank" (R. 409).

The same contention petitioners make concerning the Supremacy Clause was made before the Supreme Courts of Illinois and New Hampshire and rejected.[20]

In attempting to dilute the reservation of rights to states in the Bank Holding Company Act, petitioners emphasize a paragraph of Senate Report No. 1095[21] in a way which distorts its true meaning. *Amicus* submits that proper emphasis should be made as follows:

> "In order to clarify the legislative history of Section 7, the committee wishes to emphasize that this section does not grant any new authority to States over national banks. The purpose of the section is to *preserve to the States* those powers which they now have in our dual banking system. *It is always of uppermost importance in legisla-*

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[20] Braeburn Securities Corp. v. Smith, 15 Ill. 2d 55, 153 N.E.2d 806 (1958), *appeal dismissed for want of a substantial federal question*, 359 U.S. 311; Opinion of the Justices of New Hampshire, 151 A.2d 236 (1959). These two cases are discussed in detail in appellees' briefs.

[21] Whitney-Jefferson brief, p. 47; Comptroller's brief, p. 74.

> *tion of this nature to preserve the dual system of National and State banks, and section 7 must be viewed in that light.*" (Emphasis added)

The above part of the Senate Report, when read together with another portion, leaves no doubt that in holding company regulation, as in branching, the State law is to be respected.

> "In any event, another provision of this bill [now Sec. 7] expressly *preserves to the States a right to be more restrictive regarding the formation or operation of bank holding companies within their respective borders* than the Federal authorities can be or are under this bill. Under such a grant of authority, each State may, within the limits of its proper jurisdictional authority, be *more severe* on bank holding companies as a class than (1) this bill empowers the Federal authorities to be or (2) such Federal authorities actually are in their administration of the provisions of this bill. In the opinion of the committee, this provision *adequately safeguards States' rights as to bank holding companies.*" [22] (Emphasis supplied.)

We note particularly that this portion of the report says that states may be more restrictive and more severe "regarding the *formation* . . . of bank holding companies within their restrictive borders than the federal authorities can be or are under this bill." In the instant case the Louisiana statute broadly prohibits the formation of any bank holding company anywhere in the state, and specifically forbids "any bank holding company or subsidiary thereof to open for business. . . ." [23] As demonstrated, Congress did not preempt the field, so there can be no violation of

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[22] S. Rep. No., *supra* n. 18, p. 2492.

[23] 6 La. Rev. Stat. § 1003(5).

the supremacy clause of the federal constitution. *First National Bank* v. *California*, 262 U.S. 366, establishes the test to be applied under the Supremacy Clause. It is, simply: Does the state law conflict with, or frustrate the purpose of the federal law? The discussion above concerning § 7 and § 11 of the National Bank Act of 1956, together with their legislative history, illustrates that in no manner does the Louisiana statute conflict with or frustrate the purposes of federal law. Therefore, it does not contravene the Supremacy Clause of the Constitution of the United States.

B. Section 1003 (5) Does Not Violate the Fourteenth Amendment

The petitioners contend that the "class" of banks covered by the Louisiana statute in question has only one member: Whitney-Jefferson. They then assert that the Louisiana statute violates the Equal Protection Clause of the Fourteenth Amendment on the ground that it constitutes special legislation. The short answer to this is that the statute in question extends to the whole class of holding companies throughout the State of Louisiana—that may be established now or at any time in the future. The application of Section 1003 (5) to Whitney-Jefferson is merely an incidental effect of making the policy determination against holding companies immediately operative.

It is settled law that it is only "invidious discrimination" which offends the Equal Protection Clause of the Federal Constitution. *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489. The *Williamson* case holds that all that is required for a state statute to be upheld under the equal protection clause is that it must bear a reasonable relation to a constitutionally per-

missible objective. The Court in *Williamson* emphatically stated:

> The day is gone when this court uses the due process clause of the 14th Amendment to strike down state laws, regulatory of business industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. See *Nebbia* v. *N. Y.*, 291 U.S. 502; *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379; *Olsen* v. *Nebraska*, 313 U.S. 236; *Lincoln Union* v. *Northwestern Co.*, 335 U.S. 525; *Daniel* v. *Family Insurance Co.*, 336 U.S. 220; *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421. We emphasize again what Chief Justice Waite said in *Munn* v. *Illinois*, 94 U.S. 113, 134: "For protection against abuses by legislatures the people must resort to the polls, not to the courts." [24]

To support their special legislation contention, petitioners cite the case of *Cotting* v. *Kansas City Stockyards Co.*, 183 U.S. 79, 102-103, 112, 114-115. *Cotting* holds that when a statute only affects *one of a class* of businesses it is unconstitutional under the Equal Protection clause of the Fourteenth Amendment. In the *Cotting* case the Kansas statute was unconstitutional because it applied *only* to the Kansas City Stockyards Company and not to other corporations engaged in like business in the State of Kansas. However, in the instant case, the Louisiana statute applies equally to *all* bank holding companies that may be organized anywhere in the state. It is not directed towards a specific company but to a well-defined type of banking structure. If the law in the instant case applied to some holding companies and not to other holding companies, then its validity might

[24] *Id.* at 488.

be doubtful; but, here it applies alike to all holding companies and their subsidiaries. The petitioners cite many cases to support the proposition that even if legislation is constitutional on its face, it will fall if it is shown to be directed towards a discriminatory or otherwise unconstitutional objective.[25] But the fact of the matter is that the Louisiana statute in question is not directed towards a discriminatory or unconstitutional objective. Federal law specifically authorizes Louisiana to regulate or prohibit bank holding companies and the statute in question applies to all state incorporated holding companies and their subsidiaries. It has been clear since *Munn* v. *Illinois*, 94 U.S. 113, 132, that states have the power to legislate against commercial practices they believe to be injurious in their internal business affairs. And all that is required is that the statute have some rational relation to a practice that could be reasonably found to be injurious to local business conditions.

Lindsey v. *Natural Carbonic Gas. Co.*, 220 U.S. 61, 78, sets up the tests to be employed in weighing challenged state statutes under the equal protection clause of the Fourteenth Amendment:

> The rules by which this contention must be tested, as shown by repeated decisions of this court, are these:
>
> 1. The Equal Protection Clause of the Fourteenth Amendment does not take from the state the power to classify in the adoption of police laws, but admits the exercise of a wide scope of discretion in that regard, and voids what is done only when it is without any reasonable basis and therefore is purely arbitrary.

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[25] Whitney-Jefferson brief, p. 54.

2. A classification having some reasonable basis does not offend against the clause merely because it is not made with mathematical nicety or because in fact this results in some inequity.

3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.

4. One who assails the classification of such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. *Bachtel* v. *Wilson*, 204 U.S. 36, 41; *Louisville & Nashville R.R. Co.* v. *Melton*, 218 U.S. 36; *Ozen Lumber Co.* v. *Union County Bank*, 207 U.S. 251, 256; *Munn* v. *Illinois*, 94 U.S. 113, 132; *Henderson Bridge Co.* v. *Henderson City*, 173 U.S. 592, 615.

It cannot be reasonably contended that the police power of a state does not extend to the regulation or prohibition of bank holding companies which are created by the corporation statutes of the state. Since 1915, states have regulated or prohibited bank holding companies and no court has ever intimated that such regulation is not within the inherent police power of a state.

The petitioners also contend that the Louisiana statute violates the Due Process Clause of the Fourteenth Amendment. Their contention seems to be that the statute deprives Whitney-Jefferson of property without due process. With regard to this contention, the recent decision of this court in *Ferguson* v. *Skrupa*, 372 U.S. 726 (April 22, 1963) is dispositive. The Kansas state statute being challenged as unconstitutional in the *Ferguson* case made it illegal to operate a debt

adjustment agency within the state. The plaintiff had been in the debt adjustment business for several years before the statute was passed, and its obvious effect was to put him out of business. He contended that his business was a useful and desirable one and that his activities were not inherently immoral or dangerous or in any way contrary to the public welfare and therefore could not be absolutely prohibited. The Supreme Court flatly held that Kansas has the right to legislate over business activities that are determined to be contrary to the public welfare. The Court stated:

> The doctrine that prevailed in *Lockner, Coppage, Adkins, Burns*, and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. As this court stated in an unanimous opinion in 1941, "We are not concerned . . . with the wisdom, need, or appropriateness of the legislation." Legislative bodies have broad scope to experiment with economic problems, and this court does not sit to "subject the state to an intolerable supervision hostile to the basic principles of our government and wholly beyond the protection which the general clause in the Fourteenth Amendment was intended to secure." It is now settled that states "have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law." *Id.* at 730, 731.

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> We conclude that the Kansas Legislature was free to decide for itself that legislation was needed to deal with the business of debt adjusting. . . . We refuse to sit as a "super-legislature to weigh the wisdom of legislation", and we emphatically refuse to go back to the time when courts used the Due Process Clause "to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." Nor are we able or willing to draw lines by calling a law "prohibitory" or "regulatory." Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours. The Kansas . . . statute may be wise or unwise. But relief, if any be needed, lies not with us but with the body constituted to pass laws for the State of Kansas. *Id.* at 731, 732.

Just as the State of Kansas determined that the debt adjustment business was inimical to the public welfare of that state, so the State of Louisiana can reasonably conclude that the bank holding company business is contrary to its welfare. This policy decision of Louisiana is not as extreme in its effect as is the statute in the *Ferguson* case. It must be remembered that in Louisiana, Whitney-Jefferson had not yet engaged in the banking business; while in Kansas debt adjustment businesses had been operated for many years.

The appellants complain of the eleventh-hour timing of Subsection 5 of the Louisiana statute. We submit that the State of Louisiana, having determined not to permit holding companies, had the right to act promptly and to make sure by appropriate language that no holding company would commence operation in the state. That timing and prompt action is appropriate

in these matters is illustrated by the decision in *Commercial State Bank of Roseville* v. *Gidney*, 175 F. Supp. 770 (D.D.C. 1959) *aff'd* 278 F. 2d 871 (D.C. Cir. 1960). There Judge Youngdahl in enjoining the comptroller from issuing a certificate of authority for a new branch stated:

> "Thus, if plaintiffs have no adequate remedy once the certificate issues—and, as discussed below, it does not appear as if they do—*relief is now or never.*" (Emphasis supplied.)

When the State of Louisiana discovered that a holding company system was about to be launched by the largest bank in the state, it was faced with a "now or never" decision. It decided by a resounding vote (R. 415) to bar the formation of any holding company in the state starting at that moment. Having made this emphatic decision, it would be unthinkable that the comptroller should be able to force a holding company system upon the people of Louisiana.

III. APPROVAL OF THE WHITNEY SCHEME WILL DISRUPT FEDERAL BANKING POLICIES

Affirmance of the decisions of the courts below will uphold two longstanding federal policies: (a) to maintain competitive equality between national and state banks, and (b) to preserve competition and to restrain concentration in the field of banking.

The central issue here is whether a *holding company system* is to be born contrary to the wishes of the people of Louisiana and contrary to a federal-state statutory program which for decades has recognized that the people in each state are best able to judge the type of banking structure suitable to their economic needs. If the people in any state decide that they want a state-

wide system of independently owned banks with no branches and no holding companies, and thus no concentration of control, they are entitled to have such a banking structure under federal law. This is not a mere ideal but a reality under the delicately balanced accommodation of present federal and state banking laws which permit national and state banks to operate side by side and to compete on an equal plane.

This case presents a crucial test of this delicately-balanced dual system of banking. The federal action threatened to be taken, and avowed by the Comptroller to be taken if the injunction is lifted (R. 310), would, if upheld by this court, constitute the first major upset in this balance.

Court approval of the device used by petitioners in this case would be a blow to the avowed Congressional purpose of preventing unhealthy concentration of control of commercial credit, and would ultimately result in a reduction of available sources of supply of credit.

A. Federal Policy of Accommodation To State Banking Regulation Will Be Frustrated If the Whitney Scheme Is Approved.

The tradition of accommodation of federal laws regulating banking to state laws grew out of a necessity of preventing a collision between the two banking systems, out of which one might gain dominance over the other. This does not mean that national and state *banks* are not to compete vigorously with each other, but rather that the authorities governing the two *systems* should not be brought to the point of vying with each other for supremacy.

From the beginning of constitutional government in this country there has never been any serious doubt as to the sovereign rights of the states to charter banks, but this was not clear as to the right of the federal government. The First Bank (1791-1811) and the Second Bank (1816-1832) of the United States were the subjects of continual controversy. Their opponents contended there was no constitutional authority for the federal government to charter banks. President Jefferson opposed the creation of the First Bank; and President Jackson vetoed the bill to renew the charter of the Second Bank in 1832, pointing out that there was considerable doubt in Congress as to its constitutionality. He noted that while two previous Congresses had decided in favor of a national bank two other Congresses had at other times decided against it.

This same doubt existed in 1863 when Congress adopted the National Bank Act which passed the Senate by only two votes—and then only after strong appeals that the Act was necessary to finance the federal army in the Civil War. With these tenuous beginnings, the national banking system was launched in 1863 to operate side by side with the state banking system which by that time had gained considerable strength.

After launching the national system, there were various proposals for federal legislation to make national banks predominant or even supreme. Congress has consistently rejected such proposals; and, on the contrary, has continued to adopt legislation designed to avoid conflicts between the systems, to encourage harmony, and to maintain competitive equality. The states have done likewise.

The most important feature of the dual system is the principle of competitive equality between national and state banks as to branching, achieved by use of state law as the standard for both national and state banks. Congress has adopted state law as the measuring stick for the establishment of branches by national banks.[26] In various other areas, Congress has used state law as a guide, for example, as the measure of allowable capitalization of new national banks[27] as to interest rates on loans,[28] as to securing public money deposits,[29] as to trust powers,[30] as to conversion of a national bank to a state bank,[31], as to interest on demand deposits,[32] and as to taxation of national banks.[33]

When Congress saw that bank holding company operations were designed to evade and circumvent state branching laws and felt it necessary to regulate these holding companies for the same reason that branching is regulated—to prevent undue concentration—it pondered the necessity for federal and state accommodation in this new area of regulation. It recognized that bank holding companies were creatures of the corporation laws of the various states and would continue to be so, and that the states should have the right to decide to what extent these corporations were to be per-

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[26] 44 Stat. 1228 (1927), 12 U.S.C. § 36 (1962).

[27] 31 Stat. 48 (1900), 12 U.S.C. § 51 (1935).

[28] 48 Stat. 191 (1933), 12 U.S.C. § 85 (1935).

[29] 31 Stat. 1448 (1901), 12 U.S.C. § 90 (1950).

[30] 76 Stat. 668 (1962), 12 U.S.C. § 92a(a) (1962).

[31] 64 Stat. 456 (1950), 12 U.S.C. 214c (1954).

[32] 48 Stat. 181 (1933), 12 U.S.C. § 317a (1935).

[33] 13 Stat. 1f1 (1864), 12 U.S.C. § 548 (1926).

mitted to organize and operate within their borders. Just as state laws are guides in the operation of federal law on branching, so Congress determined that the states must be permitted the right to restrict or prohibit bank holding company operations.

In the matter of branching, 15 states restrict bank branching for state banks and 15 prohibit branching entirely (R. 412). If all of the states were to outlaw branching, as 15 now do, *no national bank could thereafter establish a branch regardless of the will of the Comptroller of the currency.* Likewise, in considering the right of the state to set the standards as to bank holding companies, it was recognized and accepted by all of the interested federal regulatory agencies, including the Comptroller, and the committees of both the House and Senate, that the states must be free to decide for themselves whether holding companies are to be permitted within their borders and, if so, to what extent. It was recognized and reported on the floor of the Senate that some state laws going back to 1915 outlawing or controlling bank holding companies were on the state statute books and must be respected. Thus, Congress again accommodated its regulation to varying state laws.

It is to be recalled at this point that in 1955, during the hearings on the eve of adoption of the Bank Holding Company Act of 1956, Congress recognized that the rapid growth of bank holding companies was considered dangerous for the economy and required immediate controls. The Federal Deposit Insurance Corporation wanted a death act; the House had voted a freeze bill designed to stop expansion of existing holding companies and to outlaw the formation of new ones; and the Senate, guided by the Federal Reserve

Board, felt that Federal restraint, supplemented by State laws, would be adequate.

The Senate version became the present Act and in urging it representatives of the Federal Reserve Board indicated that the states might not act quickly enough to control the rapid pace of holding company operations and that in the meantime an overall Federal damper was necessary. Congress recognized again that a banking structure needed in the densely populated and highly industrialized area of the East Coast is far different from that required in a prairie state.

The genius of this accommodation policy is that no substantial privilege is given to banks in one system over those in another while competing in the same geographical area; situations involving conf.. ts of law are reduced to a minimum; over-regulation in both systems is restrained; and the privilege of a bank in one system to freely convert to the other provides an inducement for improvement and modernization in each system. With diffusion of supervisory authority among the 50 states and the federal government, more freedom in the economy is assured than would be the case with a monolithic system of banking.

In short, the courts below have in effect said that the Comptroller shall not be permitted to throw the switch which will set into motion the machinery of the first holding company system to appear on the scene in Louisiana. If this Court should reverse it would not only disregard the plain will of the people of Louisiana not to have holding companies and not to have branching beyond parish lines, but would disrupt a delicately balanced sharing of regulation by federal and state authorities which has been carefully maintained by Congress since the beginning of this century.

B. Federal Policy of Preventing Concentration of Banking Will Be Undermined By Approval of the Whitney Scheme.

The history of federal bank legislation shows that from the beginning Congress has intended to maintain in this country a competitive banking system as the best means of serving a competitive economy. It has pursued this policy, in the same manner as in the commodity field, by essentially antitrust type of legislation. The Bank Holding Company Act of 1956 restrains holding company concentration of banking power for "the public interest, and the preservation of competition in the field of banking."[34] It restricts expansion of these systems across state lines;[35] and makes clear that the Act does not replace but supplements federal and state antitrust laws.[36] The Bank Merger Act of 1960 controls mergers of both national and state banks by requiring the approving agency to "take into consideration the effect of the transaction on competition (including any tendency toward monopoly) . . . in the public interest."[37]

This Court on two occasions has recently underscored this national policy, noting

> that if the businessman is denied credit because his banking alternatives have been eliminated by mergers, the whole edifice of an entrepeneurial system is threatened . . . unless competition is allowed to fulfill its role as an economic regulator in the banking industry[.]
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> * * * * * * * * *

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[34] 12 U.S.C. § 1842(c)(5).

[35] 12 U.S.C. § 1842(d).

[36] Sec. 11, 12 U.S.C. § 1841, n. 2.

[37] 12 U.S.C. § 1828(c).

> [And] that competition is our fundamental national economic policy, offering as it does the only alternative to the cartelization of governmental regimentation of large portions of the economy.[38]

In a later case, this Court observed that in banking "the elimination of significant competition . . . constitutes an unreasonable restraint of trade in violation of Section 1 of the Sherman Act."[39]

In both the Philadelphia and Lexington cases this Court found it necessary to reverse the Comptroller's approval of bank mergers.

The maintenance of competition in banking means fair competition in an open field. It means equality of opportunity between banks regardless of which governmental authority supervises them. It means that Whitney-New Orleans cannot be permitted to have a banking office located in an adjoining parish, controlled through the holding company device, when similar banking offices in that parish are denied to the plaintiff state banks by state law. The state banks in both parishes would be at a decided competitive disadvantage and Whitney-New Orleans would be able to increase its dominance of the market.[40]

Competition in banking, as presented by this case, exists at two levels. Competition at the level where each bank vies with the other for public business is

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[38] *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 372.

[39] *United States* v. *First Nat'l Bank & Trust Co. of Lexington*, 376 U.S. 665, 673.

[40] Whitney-New Orleans now controls almost 40% of all commercial bank deposits in Orleans Parish and over 30% of such deposits in the adjoining Jefferson Parish held by banks with main offices there. R. 8.

a healthy and desirable state of affairs which Congress, the Courts and most of the state legislatures foster and encourage. However, competition between national and state bank *systems* is quite a different matter. Neither should be permitted to dominate or overwhelm the other. The supervisory authority in one system should not so use his power as to give banks in his system substantial advantage over banks in the other system. As we have pointed out, the federal and state governments have equal rights to charter banks and, representing the same citizens, h long ago decided to share the field, not to seek advantages one over the other; and, at all times have observed the principle of equal competitive opportunity.

Returning now to the setting in which the 1956 Act was passed, we find that a state of urgency existed. The House Report states:

> "The time for action is now. We dare wait no longer, for already we are rapidly following the example of England whose many banks became the Big Five." [41]

The Senate Report states:

> "The dangers accompanying monopoly in this field are particularly undesirable in view of the significant part played by banking in our present national economy." [42]

The House report further states:

> "The need for immediate legislation which would . . . control the future expansion of bank holding companies . . . has been established to the complete

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[41] H. Rep. No. 609, *supra* n. 18, p. 2.

[42] S. Rep. No. 1095, *supra*, n. 19, pp. 2482-2483.

> satisfaction of your committee. . . . Our National policy has aimed at protecting and fostering the growth of independent unit banks." [43]

The Senate report further stated that the Act would

> "require contemplation of the prevention of undue concentration of control in the banking field to the detriment of public interest and the encouragement of competition in banking. It is the lack of any effective requirement of this nature in present federal laws which has led your committee to the conviction that legislation such as that contained in this bill is needed." [44]

In the instant case, Whitney-New Orleans in our view already controls an "undue concentration," without being given the further reach it would have with its holding company. In the instant case Whitney-New Orleans controlled about 39% of the total commercial deposits and 44% of all individual, partnership and corporation deposits in the parish of Orleans; and it controls over 30% of all deposits held by all banks having head banking offices and facilities in the East Bank area. (R. 104) It is noted by comparison that this Court struck down a merger, approved by the comptroller, in which the resulting bank in Philadelphia would control 36% of all deposits in the competitive area.[45] Later, this Court struck down another merger, also approved by the comptroller, at Lexington, Kentucky where, before merger, one of the banks involved had 40.06% of all deposits.[46]

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[43] H.R. No. 609, *supra*, n. 78, p. 1, 2.

[44] S. Rep. No. 1095, *supra*, n. 19, pp. 2491-2492.

[45] *United States* v. *Philadelphia Nat'l Bank*, *supra*, n. 38.

[46] *Supra*, n. 39.

In a Report of the House Committee on Small Business, dated December 23, 1960, it is shown that there has been a steady trend of concentration of banking resources into fewer and fewer hands. It was found that as of the end of 1959, 66% of total banking assets in the United States were held by branch banks and holding company banks.[47] In a later study, the Senate Small Business Committee in 1962 found that in the previous 10 year period the total number of banks in the country had shrunk while the concentration of control of banking resources was proceeding at a rapid rate.[48]

At the hearings into the conduct of the office of the Comptroller, a distinguished economist drew a comparison between concentration of control of manufacturing companies with that existing in the banking industry. Dr. Lanzillotti stated:

> "While we have deplored the fact that the 200 largest manufacturing companies control 38 per cent of total U.S. output, as of 1962 the 200 largest commercial banks in the United States held 55 percent of total assets and deposits and 57 percent of total loans. This is a very high level of aggregate concentration—whether taken in relation to other sectors of the economy or on its face.
>
> Moreover, concentration of control in banking has been increasing over the past decade due to (*a*)

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[47] STAFF REPORT TO THE HOUSE SELECT COMMITTEE ON SMALL BUSINESS, *Banking Concentration and Small Business*, 86th Cong., 2d Sess., p. 8 (Comm. Print 1960).

[48] SPECIAL STAFF REPORT OF THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM SUBMITTED TO THE SENATE SELECT COMMITTEE ON SMALL BUSINESS, *Recent Developments in the Structure of Banking*, 87th Cong., 2d Sess. (Comm. Print, Jan. 5, 1962).

> bank mergers and acquisitions, (*b*) the spread of bank holding companies, (*c*) the growth of chain banking, and (*d*) increasing interbank stockholder links and loans secured by stock in other banks. Some idea of the rather basic changes that have been taking place in the structure of banking is shown in table II."[49] (Conflict of Federal and State Banking Laws, *supra*, p. 32.)

He pointed out that such concentration adversely affects potential growth of small business.

> "The availability of alternative sources of bank financing bears importantly on the preservation of competition in other sectors of the economy. The elimination of independent sources of loans and banking services generally by the apparent permissive approach of the banking agencies will adversely affect the interests and growth potential of small business."[50]

These hearings amounted to a review of the conduct of the office of the Comptroller and, after their publication, Chairman Patman of the House Committee summarized in part the findings. Chairman Patman's summary is included as Appendix B herein.

Amicus deplores this inexorable pace of concentration in banking and urges this Court to consider the practical economic effects of its decision in this case.

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[49] *Hearings Before the House Committee on Banking and Currency*, 88th Cong., 1st Sess., at 32 (April 30, May 1, 2, 3, and 6, 1963).

[50] *Id.*, at p. 40.

IV. CONCLUSION

Amicus Curiae respectfully submits, for the reasons stated, that the decree issued herein enjoining the Comptroller of the Currency from authorizing petitioner Whitney-Jefferson to engage in the banking business should be affirmed. *Amicus* further suggests that a reversal would ultimately adversely affect the thousands of banks that are members of this association as well as encourage monopolistic banking practices.

HORACE R. HANSEN
600 Degree of Honor Building
Saint Paul 1, Minnesota
Attorney for Amicus Curiae

Of Counsel:

HANSEN AND HAZEN
FRANK T. READ
Saint Paul, Minnesota

Date: October 5, 1964

APPENDIX A

OFFICE OF THE SOLICITOR GENERAL
WASHINGTON, D. C. 20530

April 23, 1964

AIR MAIL

Horace R. Hansen, Esq.
Hansen and Hansen
600 Degree of Honor Building
Saint Paul, Minnesota 55101

Re: Saxon v. Bank of New Orleans
and Trust Co. et al. (No. 798)

Dear Mr. Hansen:

In reply to your letter of April 14, 1964, I am pleased to advise you that the government consents to your filing a brief *amicus curiae* in the above-captioned case on behalf of the Independent Bankers Association.

Sincerely,

/s/ ARCHIBALD COX
Archibald Cox
Solicitor General

COVINGTON & BURLING
UNION TRUST BUILDING
WASHINGTON 5, D. C.

Republic 7-5900

May 22, 1964

Horace R. Hansen, Esq.
Hansen and Hazen
600 Degree of Honor Building
Saint Paul, Minnesota 55101

Re: Whitney National Bank in Jefferson Parish v. Bank of New Orleans and Trust Co., et al. No. 763; Saxon v. Bank of New Orleans and Trust Co., et al., No. 798, Oct. Term, 1963

Dear Mr. Hansen:

On behalf of Whitney National Bank in Jefferson Parish, I consent to your filing an amicus curiae brief in the above case on behalf of the Independent Bankers Association.

Yours truly,

/s/ Dean Acheson
Dean Acheson

DA:sb

LAW OFFICES
EDWARD L. MERRIGAN
425 - 13TH STREET, N.W., WASHINGTON 4, D. C.
Executive 3-2674

June 1, 1964

Horace R. Hansen, Esquire
Hansen & Hazen, Esquires
600 Degree of Honor Building
St. Paul 1, Minnesota

Re: Whitney National Bank in Jefferson Parish v. Bank of New Orleans & Trust Company, et al.—No. 763; Saxon v. Bank of New Orleans & Trust Company, et al.—No. 798; October Term, 1963.

Dear Mr. Hansen:

On behalf of the Respondent banks in the above entitled cases, I hereby consent to your filing an *amicus curiae* brief in support of Respondents and on behalf of the Independent Bankers Association.

Sincerely,

/s/ EDWARD L. MERRIGAN
Attorney for Respondent Banks

ELM:1

JOSEPH H. KAVANAUGH
ATTORNEY AT LAW
P.O. BOX 4151
BATON ROUGE 4, LOUISIANA

Dickens 4-6072

August 5, 1964

Horance Hansen, Esquire
Hansen and Hansen
600 Degree of Honor Building
St. Paul 1, Minnesota

Re: Whitney National Bank in Jefferson Parish v. Bank of New Orleans and Trust Company, et al.—No. 763; and James J. Saxon, Comptroller of the Currency v. Bank of New Orleans and Trust Company, et al.—No. 798 Supreme Court of the United States

Dear Mr. Hansen:

On behalf of the State Bank Commissioner of the State of Louisiana, consent is hereby granted to the Independent Bankers Association to appear as amicus curiae before the Supreme Court of the United States in the above matter.

Very truly yours,

s/ JOSEPH H. KAVANAUGH
Joseph H. Kavanaugh
Special Asst. Attorney General
and
Special Counsel to State
Bank Commisisoner of Louisiana

JHK:eme

RICHARDS & SCOTT
ATTORNEYS AT LAW
412 DE MONTLUZIN BUILDING
NEW ORLEANS 12, LOUISIANA

August 6, 1964

Horace Hansen, Esquire
Hansen and Hansen
600 Degree of Honor Building
St. Paul 1, Minnesota

Re: Whitney National Bank in Jefferson Parish v. Bank of New Orleans and Trust Company, et al.—No. 763; and James J. Saxon, Comptroller of the Currency v. Bank of New Orleans and Trust Company, et al.—No. 798 Supreme Court of the United States

Dear Mr. Hansen:

The Bank of Louisiana, through its undersigned attorney of record, hereby consents to the appearance by the Independent Bankers Association as amicus curiae in connection with the above matter before the Supreme Court of the United States.

Very truly yours,

/s/ G. Harrison Scott
G. Harrison Scott

GHS:bf

APPENDIX B

For Release AM Tuesday
August 27, 1963

HOUSE OF REPRESENTATIVES
COMMITTEE ON BANKING AND CURRENCY
1301 HOUSE OFFICE BUILDING
WASHINGTON, D.C.

Statement of Rep. Wright Patman (D.-Texas)
Chairman, Committee on Banking & Currency

Competing banks wanting to merge or consolidate into a new national bank have better than a 20 to 1 chance of winning the necessary approval of Comptroller of the Currency Saxon, despite an almost 4 to 1 chance that at least one of the other Federal agencies will object to a loss of competition.

This was the record of Mr. Saxon's first 17 months in office, during which he received 147 applications for permission to merge, approved 140 and turned down 7. The record is contained in hearings of the House Committee on Banking and Currency made public yesterday, and is provided in new tabulations supplied by the Comptroller's office and the three other Federal agencies charged with maintaining competitive conditions in banking. The hearings, held earlier in the year, were called at the request of the Independent Bankers Association and the Association of State Bank Supervisors who complained that Comptroller Saxon was disregarding State and Federal banking laws and threatening the "dual banking system."

Before approving mergers or consolidations of national banks, the Comptroller of the Currency is required to obtain opinions from the other 3 agencies—Department of Justice, the Federal Reserve Board, and the Federal Deposit Insurance Corporation—as to whether the proposed merger will have adverse effects on competition.

In 48 of the mergers approved by Comptroller Saxon, 2 of the 3 Federal agencies objected to a loss of competition; in 23 mergers, at least one of the other Federal agencies objected; and in the case of 26 mergers, all 3 Federal agencies objected.

It appears that the Department of Justice and the Federal Reserve Board are not too far apart in seeing adverse competitive effects in bank mergers, while the FDIC foresees such effects much less often. Justice and the Federal Reserve Board gave adverse opinions on 87 mergers and 79 mergers, respectively. The FDIC gave adverse opinions in only 42 mergers. The opinions of the 3 agencies reflect differing degrees of injury to competition and are described as ranging from "slightly adverse" to "substantially adverse." These qualitative ratings may not be reliable, however, as 3 different agencies make these ratings, each with respect to its own opinions. Comptroller Saxon refused to supply a tabulation showing whether or not the opinions of the other agencies were adverse to the mergers, saying he did not think it appropriate for his office "to categorize" the recommendations of the Department of Justice.

Some impression is held that while Comptroller Saxon has been very lenient in approving mergers, he has also been very liberal in granting charters for new banks, to take the place of banks disappearing through mergers. New banks chartered by Mr. Saxon and actually open for business had, by mid-March of this year, only $33 million in deposits. The banks which had disappeared because of merger or consolidation with bigger banks had total resources of $2,176 million.

In the 17 months that 140 banks disappeared through merger or consolidation, Comptroller Saxon approved 893 applications for new branches by already existing national banks. Half of these new branches were approved for banks having deposits of over $100 million, a size attained

by only 2% of all of the country's 13,000 insured banks. About 20 per cent of the new branches were approved for banks having deposits in excess of $500 million; there are only 64 such banks in the country, and these account for less than one-half of 1% of all insured banks.

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No. 26 and No. 30

Supreme Court of the United States

OCTOBER TERM, 1964

WHITNEY NATIONAL BANK IN JEFFERSON PARISH,
Petitioner,

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL.,
Respondents.

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY,
Petitioner,

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL.,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER WHITNEY NATIONAL BANK IN JEFFERSON PARISH

DEAN ACHESON,
701 Union Trust Building
Washington 5, D.C.

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New Orleans, Louisiana
Attorneys for Petitioner.

October 30, 1964.

TABLE OF CONTENTS

Argument:	Page
I. Congress Intended the Branch Banking Law To Regulate Bank Branches and the Bank Holding Company Act To Regulate Bank Holding Companies	2
A. The Whitney Holding Corporation Is a Typical Bank Holding Company Not Calling for Any Exception to the General Statutory Pattern	3
B. Whether Whitney-Jefferson Is a "Branch" Is a Question of Federal, Not State, Law	9
II. A State May Not Prohibit the Chartering and Opening of a National Bank	13
A. The Federal Bank Holding Company Act Did Not Give the States the Power Asserted Here	13
B. Respondents' Argument That Whitney-Jefferson Never Became a National Bank Is Both Inaccurate and Irrelevant	16
Conclusion	18

TABLE OF CITATIONS

Cases:

Anderson v. *Abbott*, 321 U.S. 349	6, 7
Camden Trust Co. v. *Gidney*, 301 F. 2d 521 (D.C. Cir. 1962), *cert. denied*, 360 U.S. 886	11
Cook County Nat'l Bank v. *United States*, 107 U.S. 445	10
Corker v. *Soper*, 53 F. 2d 190 (5th Cir. 1931), *cert. denied*, 285 U.S. 540	6
Easton v. *Iowa*, 188 U.S. 220	10
First Nat'l Bank v. *California*, 262 U.S. 336	10
First Nat'l Bank v. *Drexler*, 184 So. 607 (La. App. 1938)	10
King v. *Order of United Commercial Travellers*, 333 U.S. 153	12
Labit v. *Terrebonne Parish School B'd*, 49 So. 2d 431 (La. App. 1950)	12

Cases—Continued Page

Metropolitan Holding Co. v. *Snyder*, 79 F. 2d 263 (8th Cir. 1935) 6
Mogis v. *Lyman-Rickey Sand and Gravel Corp.*, 189 F. 2d 130 (8th Cir. 1951), *cert. denied*, 242 U.S. 877 12
Rushton ex rel. Comm'r of Banking Dep't v. *Michigan Nat'l Bank*, 298 Mich. 417, 299 N.W. 129 (1941) 11
State ex rel. Singelmann v. *Morrison*, 57 So. 2d 238 (La. App. 1952) 12
Texas ex rel. Falkner v. *Nat'l Bank of Commerce*, 290 F. 2d 229 (5th Cir. 1961) 10
Wallace v. *Hood*, 89 Fed. 11 (D. Kan. 1898) 17
Walker Bank and Trust Co. v. *Saxon*, D. Utah, Sept. 30, 1964, 33 U.S.L. Week 2179 (1964) 10

Statutes and Regulations:

Banking Act of 1933, c. 89, 48 Stat. 188
§§ 20, 21 8
Federal Bank Holding Company Act of 1956, c. 240, 70 Stat. 133, as amended
12 U.S.C. § 1841(a), (d) 5
§ 1842(c) 2, 5, 7
§ 1842(d) 15, 16
§ 1843 7
§ 1844 5
§ 1845(a)(1) 4
§ 1846 ..... 13, 14, 16
§ 1848 5

National Bank Act, Act of June 3, 1864, c. 106, 13 Stat. 99, as amended
12 U.S.C. §§ 21-27 12
§ 24 17
§ 36(c) 3, 11, 12
§ 36(f) 11
§ 377 8
§ 378 8

Miscellaneous:

	Page
H. Rep. No. 609, 84th Cong., 1st Sess. (1955)	15
S. Rep. No. 1095, 84th Cong., 1st Sess. (1955)	15
Hearings Before a Subcommittee of the Senate Committee on Banking and Currency Pursuant to S. Res. 71, 71st Cong., 3d Sess. (1931)	8
75 Cong. Rec. (1932)	8
76 Cong. Rec. (1933)	8
77 Cong. Rec. (1933)	8
102 Cong. Rec. (1956)	15

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JAMES J. SAXON, COMPTROLLER OF THE CURRENCY,
Petitioner,

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL.,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER WHITNEY NATIONAL BANK IN JEFFERSON PARISH

Aside from the questions concerning jurisdiction and standing, this case presents two essentially simple issues. First, did Congress intend that the pattern of regulation devised by it to regulate branches of

national banks should be applied to bank holding company subsidiaries in any circumstances, or did Congress consider that the quite separate system of regulation it has fashioned to regulate bank holding companies would be sufficient for that purpose? Secondly, may a state, consistently with the Supremacy Clause of the Constitution, interfere with and prohibit the establishment by the appropriate federal officials of a national bank because of state objections to the ownership of the bank's stock?[1]

In this reply brief we shall attempt to restore some focus to these two questions.

ARGUMENT

I

CONGRESS INTENDED THE BRANCH BANKING LAW TO REGULATE BANK BRANCHES AND THE BANK HOLDING COMPANY ACT TO REGULATE BANK HOLDING COMPANIES.

Respondents argue that Whitney-Jefferson is a "branch" because the Whitney Holding Corporation was established to obtain as many of the advantages of branching as could legally be had. Petitioners' answer is that bank holding companies have been formed for this purpose for many years and that Congress, fully aware of that fact, has deliberately decided not to subject any or all bank holding companies to the branch banking law.

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[1] Respondents' attempt to introduce another issue, involving the antitrust laws, into the case buttresses petitioners' contention that the litigation is an impermissible collateral attack on a decision of the Federal Reserve Board. See R. 104-06 and 12 U.S.C. § 1842(c).

A. THE WHITNEY HOLDING CORPORATION IS A TYPICAL BANK HOLDING COMPANY NOT CALLING FOR ANY EXCEPTION TO THE GENERAL STATUTORY PATTERN.

Respondents appear to concede, as they must, that as a general matter national banks owned by bank holding companies are not subject to the branch banking law, 12 U.S.C. §36(c), but rather to the quite different system of regulation contained in the "holding company affiliate" provisions of the Banking Act of 1933 and in the Federal Bank Holding Company Act of 1956. (See Brief for Respondent Banks, pages 63-64, 73; Brief for Respondent State Bank Commissioner, pages 13, 15.)

This concession, once its implications are understood, concedes away respondents' entire case. Since many bank holding companies have for decades owned banks in states which prohibit or limit branch banking (R. 339-42), respondents are conceding that notwithstanding such state law two or more banks can be owned by the same holding company—which, of course, can and almost invariably does exercise control, as an incident of ownership, over its subsidiaries. What is it, then, that makes Whitney different?

Respondents claim that every bank holding company other than Whitney was organized for purposes of "investment," while Whitney was organized to evade the branch banking law.* Respondents' picture of the usual bank holding company as a mere aggregation of coupon clippers, who acquire and hold bank stock without any conception of the possibilities of multiple-office banking, is a drastic distortion of the part holding companies have played in American

*See, *e.g.*, Brief for Respondent Banks, page 63.

banking. This is fully demonstrated in our main brief; see particularly pages 16-20, 24, and 76-79.

The fact is that bank holding companies identical in purpose and substance with Whitney have been a familiar element on the American banking scene for decades. Congress has meticulously considered how this phenomenon should be regulated, and has repeatedly heard the views of those who argue that holding company banking is so close to branch banking as to warrant subjecting it to the same type of regulation.[3] But Congress rejected those views in 1933, when it did not restrict the locations of bank holding company subsidiaries, and again in 1956, when the Senate eliminated from the Federal Bank Holding Company Act a provision, contained in the bill as passed by the House, that would have subjected bank holding companies to the same limitations on location as those applied to bank branches.[4] So respondents were compelled to look farther afield for grounds for arguing that Whitney was not the ideal bank holding company that Congress had in mind.[5]

---

[3] Respondent Banks quote some of these views at pages 74-75 of their brief. What respondents fail to mention, of course, is that these statements were made in support of regulatory proposals that Congress *rejected*.

[4] See our main brief, pages 23-27.

[5] In their search for some feature that would differentiate Whitney from the usual bank holding company, respondents resurrect an argument they last made in the District Court, that the capitalization of Whitney Holding Corporation by Whitney-New Orleans violated the "upstream financing" provision of the Federal Bank Holding Company Act, 12 U.S.C. § 1845(a)(1), which forbids a bank to "invest any of its funds in the capital stock . . . of a bank holding company of which it is a subsidiary" (Brief for Respondent Banks, pages 58-59). The short answer is that at the time of the

Finally the Court of Appeals was induced to introduce a factual issue into the case. It held, without support in the record, that an intent had existed to operate Whitney-Jefferson in some unspecified unusual manner. Petitioner immediately called "foul," protesting in its petition for rehearing that "on the view of the facts and the law taken by the panel of this court the case was not ripe for summary judgment."[6] Respondents nevertheless assert, apparently seriously, that "Whitney . . . now contends

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so-called "upstream" financing Whitney Holding Corporation was not a "bank holding company" and Whitney-New Orleans was not a "subsidiary" of a bank holding company within the definitions of the Act, 12 U.S.C. §§ 1841(a) and (d). Section 1845(a)(1) does not, of course, prohibit the payment of dividends by a bank to a holding company which owns its stock, and does not restrict the use of such dividends when received. Moreover, respondents' argument is not properly presented in this litigation, since administration of the Bank Holding Company Act is vested in the Federal Reserve Board (12 U.S.C. § 1844), and the Board's approval of the financing in question can be challenged through the judicial review provided for in 12 U.S.C. § 1848.

Respondent banks also claim that Whitney is "different" because in approving the Whitney program the Federal Reserve Board recognized that Whitney-Jefferson and Whitney-New Orleans would be under common control and that the "financial history and condition, character of management, and prospects" of Whitney-New Orleans were relevant in evaluating the new bank (Brief for Respondent Banks, pages 25-26). But the Federal Bank Holding Company Act, 12 U.S.C. § 1842(c), directs the Board in passing on an application to consider, among other factors, the financial history and condition, prospects and character of management "of the company or companies and the *banks* concerned," that is, all the banks which would be members of the proposed holding company system.

[6] Headnote 2, pages 10-13, of the petition for rehearing, a copy of which has been lodged with the Clerk of this Court.

for the very first time before this Court, that it was inappropriate for the Court of Appeals to decide such a question on summary judgment." (Brief for Respondent Banks, page 64).[7] In our opinion this issue is immaterial, but if the Court believes otherwise then clearly a trial must be had on it.

With unshaken confidence in the wholly unestablished "intent" to operate Whitney-Jefferson in some impossible, but nevertheless reprehensible, manner, respondents rely upon it to warrant "piercing the corporate veil," or veils, between the Whitney Holding Corporation and the two banks, which Congress has so clearly authorized and the Federal Reserve Board has approved after such painstaking and thorough examination. Plainly the District Court was not the forum in which to attack the Federal Reserve Board on this question of fact. Moreover, Congress has long since removed the only ground for looking through the corporate structure stated in any of the cases cited by respondents that concern banks. In *Metropolitan Holding Co.* v. *Snyder*, 79 F. 2d 263 (8th Cir. 1935), and *Corker* v. *Soper*, 53 F. 2d 190 (5th Cir. 1931), *cert. denied*, 285 U.S. 540, it was held that, upon the insolvency of a bank whose stock was owned by a bank holding company without significant other assets, the double liability attaching to the bank stock could be invoked against the ultimate owners, the shareholders of the holding company. Respondents fail to mention *Anderson* v. *Abbott*, 321 U.S. 349, in which this Court reached a similar result.

These cases arose at a time (1927-32) when bank holding companies were subject to no federal regulation whatever. The courts held that if the shareholders

[7] Italics in original.

of the holding companies were not treated as the ultimate or real owners of the bank stock, the federal policy of double liability would be frustrated. As this Court observed in *Anderson* v. *Abbott*, 321 U.S. at 364-65, Congress subsequently enacted, as part of the Banking Act of 1933, provisions insuring the financial responsibility of bank holding companies. This Court recognized, *ibid.*, that if these provisions had been in force at the time of the bank failures, "piercing the corporate veil" would have been unnecessary.

Respondents also rely on an opinion given in 1911 by Solicitor General Lehmann, opposing the legality of a plan by which a New York bank set up an affiliated company whose stock was tied to that of the bank; this "affiliate" then proceeded to buy up stock both in other banks and in nonbanking corporations. The Solicitor General's opinion (reproduced at pages 3-32 of the Supplemental Appendix to Brief for Respondents) was rendered long before Congress enacted any legislation regulating bank holding companies. The Solicitor General's principal objection to the affiliate in question was that it held both bank stock and stock in nonbanking enterprises (Supplemental Appendix, *supra*, page 32); he was also concerned that its unregulated expansion created the danger of undue centralization and impairment of competition. Neither of these objections can apply to any bank holding company since the enactment of the 1956 Act, which forbids such companies to own stock in "any company which is not a bank" (12 U.S.C. § 1843) and requires that any proposed expansion of the system be approved in advance by the Federal Reserve Board, which is directed to consider any threat to "the preservation of competition in the field of banking" (12 U.S.C. § 1842(c)).

Respondent Banks allege (pages 72-73 of their brief) that in debating the Banking Act of 1933 members of Congress described the "Whitney-type 'holding company device'" as "this Frankenstein in banking," "vicious," and "mainly responsible for the depression." Actually these terms were used in reference not to bank holding companies but rather to "securities affiliates," that is, companies with the same stockholders as banks and closely tied to such banks, which engaged in the business of underwriting and trading in corporate securities. The problem of how to regulate these "securities affiliates" was one with which Congress was greatly concerned, and it was in that connection, *not* in connection with bank holding companies, that Senator Glass cited the Solicitor General's opinion of 1911.[8] Congress solved this problem by flatly prohibiting banks from engaging in the securities business either directly or through affiliates. Sections 20, 21, Banking Act of 1933, 12 U.S.C. §§ 377, 378 (1958), as amended, 12 U.S.C. § 378 (Supp. V, 1959-63). The question of branch, chain and group banking, which was considered "another question altogether,"[9] was also exhaustively studied. Every one concerned understood that branch banking and holding company banking were two different things, though there was much discussion as to their respective merits and how they should be regulated.[10] It was recognized

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[8] See 77 Cong. Rec. 3725-26 (1933); 76 Cong. Rec. 1994, 2000 (1933); 75 Cong. Rec. 9887-99, 9909-13 (1932); Hearings Before a Subcommittee of the Senate Committee on Banking and Currency Pursuant to S. Res. 71, 71st Cong., 3rd Sess. 20-23, 39-41, 116-17, 216, 231-38, 298-309, 338-42 (1931).

[9] *Hearings*, n. 8 *supra*, at 303.

[10] See *id.* at 8-9, 14-18, 119, 216, 220-24, 245-48, 263-64, 314-17, 324, 348, 576, 578, 582, 627 (1931).

that holding company banking was used "in part as a substitute where branch banking is not permitted . . . ."[11] Nevertheless, Congress' decision in 1933 was to regulate the two types of banking differently and not to impose any restrictions on the locations of bank-holding company subsidiaries. Thus the legislative history of the Banking Act of 1933, like that of the Federal Bank Holding Company Act of 1956, is conclusive as to the issue here.

B. WHETHER WHITNEY-JEFFERSON IS A "BRANCH" IS A QUESTION OF FEDERAL, NOT STATE, LAW

Respondents and *amici curiae* contend that the Comptroller was required to deny a certificate to Whitney-Jefferson because of a claimed congressional "policy of equalization" between state and national banks. Respondents' argument is in substance that the Comptroller should have denied Whitney-Jefferson a certificate to open for business as a new bank because, if a Louisiana bank owned by a bank holding company had sought such permission, the State Bank Commissioner would have denied it on the ground that the new bank would in his opinion be a "branch." According to respondents, then: (1) Section 36(*c*) incorporates state law not only as to the location of branches, but also as to the definition of what a "branch" is; and (2), despite the express language of Section 36(*c*), that section incorporates not only the "statute law" of the states but also administrative decisions made by the state banking authorities. It is said that these conclusions are required in order to carry out the alleged congressional "policy of equalization."

The fact, however, is that Congress has never

[11] *Id.* at 315-16.

adopted any general "policy of equalization" which makes the powers and characteristics of national banks vary from state to state depending on the powers and characteristics of the fifty state banking systems. To the contrary, the National Bank Act of 1863 was designed to establish a uniform system throughout the country which would not be subject to every vagary of state law or regulation.[12] Congress has, indeed, chosen to incorporate certain aspects of state law into the federal banking law. But, except in the specific instances where Congress has done so, the powers and characteristics of national banks are determined not by the law of the state in which they are located, but by the National Bank Act. The "policy of equalization" governs where Congress has directed it to govern, and not otherwise.[13]

One of the respects in which Congress has incorporated state law is that a national bank may establish a branch only at a location where the statute law of the

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[12] See Cook County Nat'l Bank v. United States, 107 U.S. 445, 448; Easton v. Iowa, 188 U.S. 220; First Nat'l Bank v. California, 262 U.S. 366; First Nat'l Bank v. Drexler, 184 So. 607 (La. App. 1938).

[13] See pages 29-30 and 45 of our main brief for examples of situations where federal law governs the powers of national banks regardless of state law. "Equalization" does not even apply throughout the branching area. For example, Congress has provided for the operation by national banks of banking facilities at military installations, regardless of whether state banks could establish branches there. Texas *ex rel.* Falkner v. Nat'l Bank of Commerce, 290 F. 2d 229 (5th Cir. 1961). It has recently been held that 12 U.S.C. § 36(c) (1a permits branching within a single city by national banks in circumstances where a state bank could not establish branches. Walker Bank and Trust Co. v. Saxon, D. Utah, Sept. 30, 1964, 33 U.S.L. Week 2179 (1964).

state in which it operates would permit a state branch to establish a branch (12 U.S.C. § 36(c)). But the definition of the term "branch" is purely a matter of federal law (12 U.S.C. § 36(f)), and it is plain that by that term Congress meant an additional office of the same national banking association, not a separately chartered bank. Louisiana cannot, by defining as "branches" things which are not branches under federal law, unilaterally enlarge the scope within which its law is made applicable by Section 36(c).[14]

Startling consequences would result if respondents' theory were accepted. For example, if Louisiana considered one state bank a "branch" of another merely because the two banks had one common shareholder owning one per cent of the stock, the Comptroller would be required to deny an application to establish a new national bank if the same degree of common ownership existed. Similarly, if Louisiana took the position that a state bank established a new "branch" every time it expanded to another floor of the same office building, the Comptroller would be bound by the same restriction. Respondents' theory is in direct conflict with the National Bank Act and with the entire philosophy behind the national banking system.

Moreover, respondents point to nothing in the statute or decisional law of Louisiana which would make ownership of two state banks by the same bank holding

[14] The lower courts in the present case never intimated that state law was relevant on this point. In Camden Trust Co. v. Gilbert, 301 F. 2d 521, 525, 526 (D.C. Cir. 1962), *cert. denied*, 360 U.S. 886, an argument identical to that now made by respondents was rejected without comment. Substantially the same theory was squarely rejected by a state court in Rushton *et al.* Comm'r of Banking Dep't v. Michigan Nat'l Bank, 298 Mich. 417, 299 N.W. 129, 136 (1941).

company a violation of the state branch banking law.[15] Respondents rely on an unauthoritative[16] opinion of the Attorney General of Louisiana which alleged that holding company banking across parish lines is "prohibited, if not by the letter, by the spirit of our law" (R. 163). Respondents principally rely, however, on the fact that, if a bank holding company applied to the State Banking Commissioner of Louisiana for authority to establish a state bank in circumstances analogous to the Whitney holding program, the Commissioner would deny the application. But that fact does not bind the Comptroller, because (1) there is no incorporation of state law in the provisions for the establishment of new banks; 12 U.S.C. §§ 21-27, under which Whitney-Jefferson sought its charter; (2) Section 36(*c*) incorporates state law only with respect to the locations of what federal law defines as branches; and (3) only state statute law, not the views of state banking officials, is incorporated.

If the Comptroller were bound to follow, not only state statute law, but also the discretionary decisions of state officials, he would have to refer every application for a new branch to the bank commissioner of the state in question for his binding decision as to whether he would grant it if the applicant were a state bank. If respondents' views were accepted, the Comptroller would also have to refer every application for

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[15] The Federal Reserve Board correctly concluded, R. 104, that Louisiana law did not prohibit the Whitney program.

[16] See King v. Order of United Commercial Travelers, 333 U.S. 153, 161; Mogis v. Lyman-Rickey Sand and Gravel Corp., 189 F. 2d 130, 140 (8th Cir. 1951), *cert. denied*, 342 U.S. 877; Labit v. Terrebonne Parish School B'd, 49 So. 2d 431, 434 (La. App. 1950); State *ex rel.* Singelmann v. Morrison, 57 So. 2d 238, 247 (La. App. 1952).

the chartering of a new bank to the state bank commissioner for his binding decision as to whether he would consider it a "branch" of some other bank. Such a requirement would wholly undermine the autonomy of the Comptroller's office and of the entire national banking system.

II

A STATE MAY NOT PROHIBIT THE CHARTERING AND OPENING OF A NATIONAL BANK

The Louisiana statute here in question attempts to prohibit the Comptroller from chartering a national bank, and the bank from doing a banking business, even though the bank has met all the qualifications laid down in federal law. The Louisiana statute presents a plain conflict between state law and valid federal law, and therefore may not stand.

A. THE FEDERAL BANK HOLDING COMPANY ACT DID NOT GIVE THE STATES THE POWER ASSERTED HERE

Respondents attempt to sustain the statute by relying on Section 7 of the Federal Bank Holding Company Act of 1956, 12 U.S.C. § 1846. Petitioners showed in their main briefs (Brief for Petitioner Saxon, pages 72-74; Brief for Whitney-Jefferson, pages 46-51) that both the language of this section and its legislative history demonstrate that it cannot be read as a grant of any power to the states, but merely as an expression of Congress' intention not to preempt the field of *bank holding company* regulation. The states may regulate bank holding companies so long as their regulation does not infringe some constitutional or federal statutory provision. The issue is whether the

particular means chosen by Louisiana—the attempt to prohibit a national bank from doing business because it is owned by a bank holding company—is in conflict, not with the Federal Bank Holding Company Act, but with the National Bank Act. While the Holding Company Act did not preempt the field of bank holding company regulation, the National Bank Act did preempt the field of the establishment and chartering of national banks and the setting of conditions on their right to do a banking business.

Respondents cite language as part of the legislative history of the Federal Bank Holding Company Act that in fact described provisions of the House version of the bill which the Senate later rejected. Section 7 as enacted merely reserves to the states the right to enact otherwise legal and constitutional measures regulating bank holding companies. It does not reserve to the states, since they never had it, the right to enact illegal and unconstitutional measures: for example, Louisiana could not confiscate all assets of bank holding companies within its borders, though that would surely discourage such companies from operating in the state. Whatever legislation Louisiana might validly enact regulating the stock ownership of Whitney-Jefferson, Louisiana may not compel a national bank to close its doors or prevent it from opening them.

Respondents rely heavily on Senator Robertson's statement that Section 7 would preserve to the states the right to enact such legislation as Georgia had already put into effect. But the Georgia statute, like those involved in the Illinois and New Hampshire cases discussed in our main brief (at pages 48-49), operates only on bank holding companies, and contains

no provision similar to Louisiana's attempt to prevent a national bank from opening.[17] It is therefore without relevance here.

Respondents also rely on Section 3(d) of the Federal Bank Holding Company Act, the present 12 U.S.C. § 1842(d). This section provides that the Federal Reserve Board shall not approve an application of a bank holding company incorporated in one state to acquire the stock of a bank in another state unless the statutory law of the latter state specifically authorizes such an acquisition. By its terms, of course, the section is not applicable here, and Congress expressly rejected an attempt to make it applicable to bank holding companies operating, like Whitney, entirely within the borders of a single state. (See our main brief, pages 23-27.)[18]

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[17] The Georgia statute is set out at R. 416-19.

[18] In the bill as introduced into the House of Representatives and as reported by the House Committee, the section corresponding to the present Section 3(d) made state law a yard-stick not only as to bank holding companies operating across state lines, but also as to such companies operating within a single state. H. R. Rep. No. 609, 84th Cong., 1st Sess. 24 (1955). The Senate Committee deleted the entire section from the bill. S. Rep. No. 1095, 84th Cong., 1st Sess., pt. 1, at 11 (1955). The present Section 3(d) originated as an amendment offered on the floor of the Senate by Senator Douglas. He did not seek to restore the entire broad provision of the House bill, but only that part which dealt with bank holding companies that operated across state lines. It was the "great banking empires across state lines," not the smaller, single-state bank holding companies, which Congress considered dangerous and wished to curb. 102 Cong. Rec. 6857-59, 6862 (1956). Congress is thus specifically on record as repudiating the broad interpretation which the respondents give to Section 3(d) as applying, in some attenuated sense, outside the area expressly covered by its language.

Section 3(d) was enacted because Congress feared that the states lacked sufficient jurisdiction to control interstate bank holding companies to the same extent to which they could control holding companies subject to their jurisdiction. Congress' direction was to the Federal Reserve Board, and does not mean that a state might constitutionally provide for the closing of a national bank if, contrary to Section 3(d), stock in the bank had been acquired by a foreign bank holding company. It is regulation of bank holding companies, not of national banks, which Congress has permitted the states to undertake. This is what both Section 3(d) and Section 7 illustrate. Neither section permits the states, in any circumstances, to close down national banks or to prevent them from opening. Indeed, if a state could prevent a national bank within its borders from operating because of disapproval of the ownership of its stock, Section 3(d) would have been wholly unnecessary, since the states could have excluded interstate bank holding companies by that means.

B. RESPONDENTS' ARGUMENT THAT WHITNEY-JEFFERSON NEVER BECAME A NATIONAL BANK IS BOTH INACCURATE AND IRRELEVANT.

Respondents further contend that Whitney-Jefferson is not entitled to protection as a federal instrumentality because it was not a national banking association when the Louisiana statute was enacted on July 10, 1962. Respondents contend that on that date Whitney-Jefferson was a "'mere 'body corporate,'" not a "national bank" (Brief for Respondent Banks, page 31; see also *id.* at 82-83, and Brief for Respondent Louisiana State Bank Commissioner, pages 29-30).

This is plain error; 12 U.S.C. § 24 expressly provides that:

> "Upon duly making and filing articles of association and an organization certificate, a *national banking association* shall become, as from the date of the execution of its organization certificate, a body corporate . . . ." (Italics added.)

Whitney-Jefferson filed its articles of association and its organization certificate on May 10, 1962 (R. 390). It became both a body corporate and a national banking association on that date, and was recognized as such by the Deputy Comptroller of the Currency by letter dated May 11, 1962 (R. 392-94). The further certificate required by 12 U.S.C. § 27 does not create a national banking association, but rather permits the association already in existence to commence a banking business. See *Wallace* v. *Hood*, 89 Fed. 11, 19 (D. Kan. 1898).

All this, however, is beside the point. Although Whitney-Jefferson did become a national banking association before the effective date of the Louisiana statute, it would make no difference if it had not. What is at issue here is not the protection of Whitney-Jefferson as such, but rather the Comptroller's right to take action without state interference under a congressional mandate to create and charter federal instrumentalities to perform federal functions. It is respondents' assault on that right that has so far prevented the Comptroller from issuing his certificate and has kept the doors of an authorized national bank closed. The Comptroller, acting under the provisions of the National Bank Act and having made all investi-

gations and determinations required thereby, has correctly concluded that Whitney-Jefferson is entitled to conduct a national banking business. This conclusion is governed exclusively by federal law. Louisiana may not interfere with any state of the process by which the Comptroller authorizes and establishes this federal instrumentality.

CONCLUSION

For the reasons stated in our main brief and in this reply brief, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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